Supreme Court, U.S.
FILED

No. 10-

10-80 JUL 12 2010

IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

In re ASSICURAZIONI GENERALI, S.P.A.,

DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A. and
BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SAMUEL J. DUBBIN
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

ERWIN CHEMERINSKY
Counsel of Record
University of California,
Irvine School of Law
401 E. Peltason
Irvine, CA 92697-8000
(949) 824-7722
EChemerinsky@law.uci.edu

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G St., NW
Suite 500
Washington, DC 20005
(202) 652-4511

Attorneys for Petitioner

QUESTION PRESENTED

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court held that a California statute requiring European insurance companies to disclose Holocaust-era insurance policies was preempted by executive agreements with Germany and Austria which provided an alternative forum for resolution of such claims. In this case, the United States Court of Appeals for the Second Circuit held the state common law claims by the heirs of Holocaust victims against an Italian insurance company were preempted, despite the absence of an executive agreement and in the face of no other relief being available. This case thus poses the issue:

Whether common law state claims are preempted by federal foreign policy interests in the absence of an executive agreement and where no other recourse would be available to the plaintiffs.

LIST OF PARTIES

All parties in the lower courts have settled other than the Petitioner and Respondents.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Petition	7
THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO PROVIDE RELIEF TO THE PLAINTIFFS.	7

Contents

	Page
A. Does *Garamendi* Preempt State Common Law Claims?	9
B. Does *Garamendi* Apply in the Absence of An Executive Agreement?	12
C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possibility of Relief?	19
Conclusion	21

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided And Filed January 15, 2010 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of New York Dated October 14, 2004 ..... 16a

Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Filed April 12, 2010 ..... 54a

Appendix D — U.S. Letter Brief Dated October 30, 2008 ..... 56a

Appendix E — Supplemental U.S. Letter Brief Dated October 27, 2009 ..... 72a

TABLE OF CITED AUTHORITIES

Page

Cases

In re Agent Orange Product Liability Litigation,
373 F.Supp.2d 7 (E.D.N.Y. 2005) 10-11

Altria Group, Inc. v. Good,
129 S.Ct. 538 (2008) 12

American Insurance Association v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

Barclay's Bank PLC v. Franchise Tax Board,
512 U.S. 298 (1994) 14

Central Valley Chrysler-Jeep v. Witherspoon,
456 F.Supp.2d 1160 (E.D. Cal. 2006) 15

Cruz v. United States,
387 F.Supp.2d 1057 (N.D. Cal. 2005) 10

Diermenjian v. Deutsche Bank, A.G.,
526 F.Supp.2d 1068 (C.D. Cal. 2007) 17

Ibrahim v. Titan Corp.,
391 F.Supp.2d 10 (D.D.C. 2005) 16

Medellin v. Texas,
552 U.S. 491 (2008) 17, 18

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 11, 20

Cited Authorities

Page

Movsesian v. Victoria Versicherung AG,
578 F.3d 1052 (9th Cir. 2009) 15

Oestereich v. Selective Service System, Local Board 11,
393 U.S. 233 (1968) 20

Reno v. Catholic Social Services,
509 U.S. 43 (1993) 20

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 11

Saleh v. Titan,
580 F.3d 1 (D.C. Cir. 2009) 9

Sanchez-Llamas v. Oregon,
548 U.S. 331 (2006) 18

Schydlower v. Pan American Life Insurance Co.,
231 F.R.D. 493 (W.D. Tex. 2005) 10

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 20

Steinberg v. International Com'n on Holocaust Era Claims,
133 Cal.App.4th 689, 34 Cal.Rptr.3d 944
(Cal. App. 2005) 15

Cited Authorities

Page

Taiheiyo Cement Corp. v. Superior Court,
117 Cal.App.4th 380, 12 Cal.Rptr.3d 32
(Cal. App. 2004) 16

Whiteman v. Dorotheum GmbH & Co., KG,
431 F.3d 57 (2d Cir. 2005) 16

Wyeth v. Levine,
129 S.Ct. 1187 (2009) 11, 12

Miscellaneous

Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997) ... 9-10

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, dated January 15, 2010, is reported at 592 F.3d 113 (2d Cir. 2010) and is attached as Appendix pp. 1a-15a. The order of the United States Court of Appeals for the Second Circuit, dated April 12, 2010, denying the petition for rehearing and rehearing en banc, is attached as Appendix pp. 54a-55a.

The District Court's order, dated October 14, 2004, is attached at Appendix pp. 16a-53a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit, dated January 15, 2010, pursuant to 28 U.S.C. §1254. The United States Court of Appeals for the Second Circuit denied rehearing and rehearing en banc on April 12, 2010.

STATEMENT OF THE CASE

This case raises important questions about the Executive's power to make law and simultaneously to nullify long-standing state common law without following any sort of constitutionally or statutorily established procedure. It raises issues left unresolved by this Court in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), concerning whether state common law claims are preempted by the implied dormant foreign affairs power of the President in the absence of an executive agreement. Although as in *Garamendi*, this

case arises in the context of long-delayed (and denied) payment of contractual obligations owed to victims of the Holocaust, the Second Circuit's opinion in this case expands Executive authority far beyond what *Garamendi* allowed and conflicts with the approach taken by this Court and lower federal courts since *Garamendi*.

A. Delayed Compensation for Victims of Nazi-Era Persecution

In the years leading up to World War II, many Jewish families in Europe purchased insurance policies from an Italian company, Assicurazioni Generali, which was founded by Jewish merchants in 1831. Jewish and other persecuted minorities "purchased insurance policies from Generali believing this would provide protection against the rise of Nazi power." *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115 (2d Cir. 2010). However, Generali cooperated with the Nazis during the war and refused to pay the beneficiaries of those policies following the surrender of Germany and Italy.

After World War II, the Western Allies were concerned that the burden of reparations would hinder their efforts to rebuild Germany and established a moratorium on reparation claims with the London Debt Agreement. In 1996, German courts interpreted the treaty reunifying East and West Germany as lifting that moratorium. As a result, many Holocaust claimants filed suit against companies which did business with the Nazi-era German government

B. The United States-Germany Executive Agreements

In 2000, the United States and Germany reached an agreement for the German government to establish a foundation to "compensate all victims who suffered at the hands of German companies during the Nazi era." *Id.* at 116. In return, President Clinton pledged, through a formal Executive Agreement, that whenever a German company was sued on a Holocaust-era claim in American courts (state or federal), the Executive Branch would submit a non-binding statement of interest to the court expressing that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406. The United States-Germany Executive Agreement covered principally claims by former slave laborers ($1 billion) and forced laborers ($3 billion) that had been previously dismissed in federal courts.

The Executive Agreement between Germany and the United States specified that the Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC) to handle insurance claims against German companies. The Executive Agreement created a $250 million cap on such claims. The ICHEIC was formed in 1998 by several European insurance companies, including Generali, the State of Israel, Jewish non-survivor NGOs, and the National Association of Insurance Commissioners. The purpose

of the ICHEIC was to create a "voluntary, non-adversarial" forum for resolution of claims that arose under those policies. The United States reached a similar agreement with Austria, which also included insurance claims, and an agreement with France, which did not address insurance claims. The United States has negotiated no such agreement with Generali's home nation, Italy.

C. Generali Faces Lawsuits in American Courts

Various plaintiffs sued Generali in 20 separate actions in American courts, seeking damages for the company's refusal to pay contractually owed benefits to Holocaust-era policy holders or their heirs.[1] The Panel on Multidistrict Litigation transferred those cases to the Southern District of New York, which dismissed the claims under this Court's decision in *Garamendi*. *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F.Supp.2d 494, 497 (2004) ("[I]t appears that the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.") Generali reached settlements with the plaintiffs in most of the cases, while the plaintiffs in the two remaining cases, Dr. Thomas

---

1. In 2000 and 2001, Generali sought a statement of interest from the Clinton Administration asserting that the United States foreign policy interests favored dismissal, similar to what was promised to German insurers, but the Clinton Administration refused because of the absence of an executive agreement with Italy.

Weiss and Mr. Edward David, pursued appeals to the Second Circuit.[2]

D. The Court of Appeals' Decision

The Second Circuit, *sua sponte*, requested advice from Secretary of State Condoleezza Rice whether adjudicating the suits would conflict with the foreign policy of the Bush administration. The Department of Justice, not the State Department, responded with a letter brief asserting that the foreign policy interests of the United States favor using the ICHEIC as the exclusive forum for resolution of insurance claims. Significantly, however, the letter brief made clear the government did not consider its foreign policy interests to be an independent basis for dismissal of the cases. Following the election of President Obama, the Second Circuit made a similar request for advice of Secretary of State Hillary Clinton. The Department of Justice again responded with a letter brief which indicated the policy was unchanged under the Obama administration.

In January 2010, the Second Circuit affirmed the district court's dismissal, holding that a United States foreign policy interest existed in favor of using the ICHEIC as the exclusive forum for resolving Holocaust-

---

2. The putative class cases settled at the briefing stage and over 25 individual plaintiffs pursued their appeals in the Second Circuit. After the court's *sua sponte* letter to Secretary of State Rice seeking the Bush Administration's position, all plaintiffs except Dr. Weiss and Mr. David settled. Petitioner has been informed that after the Second Circuit denied rehearing in April 2010, Mr. David reached a settlement with Generali.

era insurance claims. The court interpreted the executive agreements involved in *Garamendi* as being expressions of the government's foreign policy, rather than the definition of that policy. *Generali*, 592 F.3d at 118. Therefore, the Second Circuit determined that it did not matter whether the United States had negotiated an executive agreement with Italy; the letters from the Department of Justice were sufficient to express the government's policy regarding claims against Generali. The Second Circuit also found it irrelevant that unlike *Garamendi*, where the German and Swiss governments actively opposed California's disclosure statute, the government of Italy had never opposed plaintiffs' litigation against Generali.

The court of appeals rejected the argument by the plaintiffs that much stronger, traditional state interests — the right of citizens to pursue ordinary contract and tort claims under state law — were at play here than in *Garamendi*. *Id.* at 119. The Second Circuit applied *Garamendi* in holding that "state law must yield to the federal policy, regardless of the importance of the interests behind the state law." *Id.*

The Second Circuit also rejected the plaintiffs' argument that, because the ICHEIC had set a deadline of December 31, 2003 for accepting claims, dismissal of the suits would deny the plaintiffs the opportunity to pursue the claims in any forum. The court held that because the government said its policy was for the ICHEIC to be the exclusive forum for these claims, "if the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close." *Id.*

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO PROVIDE RELIEF TO THE PLAINTIFFS.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court, in a 5-4 decision, concluded that a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA") was preempted by federal law. The California statute applied to insurance companies doing business in California and required them to disclose details of insurance policies sold in Europe between 1920 and 1945 or face suspension of their license to do business in the state. California was concerned by the "stonewalling" by insurance companies and by the failure of the federal government to effectively gain information about these policies and payments under them.

This Court concluded that HVIRA was preempted by the foreign policy of the United States to "encourage European insurers to work with the ICHEIC [International Commission on Holocaust Era Insurance Claims] to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* at 421. The Court was explicit that

preemption was based on "the national position, *expressed unmistakably in the executive agreements signed by the President.*" *Id.* (emphasis added).

The district court and the court of appeals expanded on this Court's holding in *Garamendi* to conclude that the plaintiffs' claims against Generali were likewise preempted by federal law even though here, unlike *Garamendi*, common law claims are asserted,[3] no executive agreement exists, the Italian government never opposed the lawsuit, and no other recourse is available to the plaintiffs. The Second Circuit was explicit that its dismissal of plaintiffs' suits was based on this Court's decision in *Garamendi.* It stated: The Second Circuit declared: "[W]e hold under the authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States." 592 F.3d at 120.

---

3. The Weiss complaint, which is the basis of this petition for certiorari, presented 13 counts, 11 of which were under Florida common law.

The insurance agreement entered into between Generali and Petitioner's father Pavel Weiss provides that Generali would pay the insured's policy benefits anywhere in the world where payment was requested, which in this case was Florida.

In the spring of 1944, Pavel Weiss, and his wife Helen and their three young children Julie, Alice, and Salomon, were deported to Auschwitz. Mr. Weiss's wife and children were murdered upon their arrival at Dr. Mengele's instructions. After liberation in 1945, Mr. Weiss recuperated from shrapnel wounds, typhus, and other injuries and illnesses in a military hospital. After a brief return to Czechoslovakia, he emigrated to the United States, eventually settling in Florida in 1949 for health reasons. Mr. Weiss passed away in Miami Beach in 1985.

In finding preemption, the lower courts in this case failed to appreciate key differences between this case and *Garamendi*. These differences raise important unresolved issues of federal law and, in fact, have caused splits among the lower courts. This Court's review is needed to clarify the scope of preemption under *Garamendi* in light of this Court's subsequent decisions and in view of the split among the lower courts which has developed in applying *Garamendi*.

A. Does Garamendi Preempt State Common Law Claims?

In *Garamendi*, the question was whether a state *statute* was preempted by federal law, whereas here the issue is whether *common law* liability under state law is preempted. The central concern of *Garamendi* was with a state legislating in a manner that had extraterritorial effect and interfered with the foreign policy choices of the Executive. Thus, this Court held that the California statute was preempted because it "employs a different state system of economic pressure and in doing so undercuts the President's diplomatic discretion and the choice he made exercising it." *Id.* at 423-24 (quotation omitted); *see also id.* at 427 ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.")

These concerns are not present with common law claims. Indeed, as Judge Garland noted, "no precedent has employed a foreign policy analysis to preempt generally applicable state laws." *Saleh v. Titan*, 580 F.3d 1, 24 n.8 (D.C. Cir. 2009) (Garland, J., dissenting). *See* Jack Goldsmith, *Federal Courts, Foreign Affairs,*

and Federalism, 83 Va. L. Rev. 1617, 1711 (1997) (explaining that foreign affairs preemption should be limited to, at most, state laws that purposely interfere with foreign policy, not state laws that "are facially neutral and were not designed with the purpose of influencing U.S. foreign relations").

Contrary to the Second Circuit's approach, other lower courts have concluded that common law liability is not preempted by this Court's decision in *Garamendi*. In *Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005), the beneficiary of a life insurance policy bought in Cuba brought a putative class action against the life insurer, alleging state law claims for breach of contract, fraud, and misrepresentation. The defendant moved to dismiss based on *Garamendi* and contended that the plaintiff's lawsuit was preempted by the process and purpose of the Foreign Claims Settlement Commission. The court denied the motion to dismiss and distinguished *Garamendi* on the ground that it involved a new statute and not common law claims. The court explained:

> The Court understands *Garamendi* to deal with a state's ability to pass a law which specifically circumvents federal foreign policy by creating a state cause of action which provides relief for its citizens. Here the Court deals with an individual's lawsuit and not a state's creation of a new cause of action.

Id. at 498. *See also Cruz v. United States*, 387 F.Supp.2d 1057 (N.D. Cal. 2005) (*Garamendi* is limited to conflicts preemption); *In re Agent Orange Product Liability*

Litigation, 373 F.Supp.2d 7, 79-80 (E.D.N.Y. 2005) (same).

Significantly, since *Garamendi*, this Court has evidenced a great reluctance to preclude state common law liability based on implied preemption. In *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009), this Court stressed the strong presumption against a finding of federal preemption, noting that "[i]n all preemption cases, and particularly in those . . . in a field which the States have traditionally occupied . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of the Congress.'" (Quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court in *Wyeth* explained that "[w]e rely on the presumption [against preemption] because [of the] respect for the States as 'independent sovereigns in our federal system.'" 129 S.Ct. at 1195 n.3.

This Court thus refused to find implied preemption of state tort liability for those injured by the failure of drug companies to adequately warn physicians and patients about possible side effects of prescription drugs. *See also Wyeth v. Levine*, 129 S.Ct. at 1205 (Thomas, J., concurring in the judgment)

> I have become increasingly skeptical of this Court's "purposes and objectives" pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or

But this case is quite different because there is no executive agreement. Unlike the countries involved in *Garamendi*, there never has been an executive agreement between the United States and Italy with regard to Holocaust-era insurance claims.[4] This matters enormously because *Garamendi* was based on the authority of the President to enter into executive agreements, including agreements to settle claims. An executive agreement is formally entered into, has the force of law, and can be overridden by a federal statute. It is a binding agreement of the United States with a foreign country.

But here the Second Circuit was willing to find preemption based on nothing more than the opinions expressed by the Department of Justice. There is no United States government action with the force of law, no action by the President himself, no conflict with any foreign law, and no opposition from any foreign government. This is a substantial expansion of the circumstances in which preemption will be found and raises an important issue as to the scope of preemption under *Garamendi* which this Court needs to resolve. *See Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 329 (1994) ("The Executive Branch actions, press releases, and amicus briefs . . . are merely precatory. Executive Branch communications that

---

4. The Court in *Garamendi* also cited extensive post-WWII negotiations and agreements concerning reparations and restitution for Holocaust victims involving the United States and Germany. In contrast, there were no international negotiations or agreements for restitution of victims' property with Italy after WWII, including up to the present time.

express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide reporting.")

Since *Garamendi*, lower courts have disagreed as to whether the existence of an executive agreement is necessary for such preemption. The Ninth Circuit, like the Second Circuit in this case, found that an executive agreement is not necessary for preemption. In *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009), the court found that a California law which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian genocide victims conflicted with the Executive branch's clearly expressed foreign policy refusing to officially recognize the Armenian Genocide. The court acknowledged that there was an executive agreement in *Garamendi*, but held that this was not required to find preemption. *See also Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160, 1179 (E.D. Cal. 2006)

> The Supreme Court cases do not suggest that the absence of a statute or an executive agreement is fatal to a foreign policy preemption claim. . . . If Executive Branch statements are competent evidence of what our foreign policy is, the court sees no reason to limit preemption to foreign policy as expressed in statutes or executive agreements.

Steinberg v. International Com'n on Holocaust Era Claims, 133 Cal.App.4th 689, 700-01 & n.14, 34 Cal.Rptr.3d 944, 952-53 & n.14 (Cal. App. 2005) (for

preemption purposes, letter from United States Ambassador suffices as an expression of foreign policy); *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal.App.4th 380, 386 n.4, 392-94, 12 Cal.Rptr.3d 32, 36 n.4 (Cal. App. 2004) (no affirmative federal activity is required for successful invocation of the foreign affairs preemption doctrine).

But other courts have found that *Garamendi* is limited to instances in which there is an executive agreement preempting state law. For example, in *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10 (D.D.C. 2005), Iraqi detainees and spouses of deceased detainees brought an action against two private government contractors who provided interrogators and interpreters to the United States military. The court expressly distinguished *Garamendi* and declared that "[h]ere, unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings." *Id.* at 16.

Similarly, in *Whiteman v. Dorotheum GmbH & Co., KG*, 431 F.3d 57 (2d Cir. 2005), the court stressed that preemption under *Garamendi* is based on the existence of executive agreements. The court explained:

> Deference to a statement of foreign policy interests of the United States urging dismissal of claims against a foreign sovereign is appropriate where, as here, (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of those claims; (2) the United

> States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims.

Id. at 59-60. *See also Diermenjian v. Deutsche Bank, A.G.*, 526 F.Supp.2d 1068, 1077 (C.D. Cal. 2007) (federal preemption of state statutes may be predicated on "treaties and executive agreements.")

Quite importantly, the Second Circuit's approach — finding preemption in the absence of an executive agreement — is inconsistent with this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). *Medellin* involved a Mexican national who was sentenced to death in Texas for murder. In violation of the Vienna Convention, his home nation's consulate had not been notified. The International Court of Justice ordered the United States to comply with the Vienna Convention and President Bush issued a Memorandum ordering the Texas Courts to comply with this mandate.

This Court held that the Vienna Convention was not enforceable because it was not self-executing and because Congress had not formally executed the treaty. More importantly for this case, the Court found that the President's Memorandum was not binding on Texas. This Court noted that "[t]he claims-settlement cases

involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531. In language directly on point for this case, the Court stated that the "President's narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum." *Id.* at 532.

In *Medellin*, this Court made clear that a presidential directive in the absence of an executive agreement or an executed treaty was not sufficient to override state law. This holding is in direct conflict with the Second Circuit's willingness in this case to find preemption based on statements of the Department of Justice in the absence of an executive agreement.[5] This Court should grant review to resolve an issue left open in *Garamendi* and which is dividing the lower courts as to whether preemption based on foreign policy interests can be found in the absence of a statute, treaty, or executive agreement.

---

5. Also, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 332 (2006), this Court expressed that

> [t]he Court's authority to create a judicial remedy applicable in state court must therefore lie, if anywhere, in the treaty itself. . . . But where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.

Here, the Second Circuit precluded state claims in the absence of a treaty or an executive agreement, based entirely on letters from the Department of Justice.

C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possibility of Relief?

Dismissal here, unlike *Garamendi*, will leave the plaintiffs with no recourse at all. The ICHEIC had a December 31, 2003 deadline for accepting claims and thus the ICHEIC process is not available to plaintiffs. The result of the dismissal is to leave the plaintiffs with no possibility of relief. The Second Circuit found that this is irrelevant and declared: "Permitting state-law claims to proceed now that ICHEIC has ceased operations directly conflicts with [the policy goal that it be the exclusive forum and remedy for claims within its purview.]" 592 F.3d at 119.

But there is an enormous difference between finding preemption of state law claims when the effect is to shift them to a different forum and finding preemption of state law claims when the effect is to preclude them entirely because no forum is available.[6] Nothing in

6. Nor is this argument affected by plaintiffs' choice to not file claims in the ICHEIC. When this case was filed in Florida state court in June 2000, the ICHEIC was regarded as voluntary and supplemental, and those who did apply to the ICHEIC were able to reject any offer that was unsatisfactory and were able to then file a claim in court. In 2001, prior this Court's decision in *Garamendi*, Generali moved to dismiss the claims against it on forum non conveniens grounds, claiming that the ICHEIC should be deemed the exclusive remedy. The district court denied this motion holding that ICHEIC was "entirely a creature of six founding insurance companies . . . the decision-making processes [of which] are and can be controlled by the defendants in this case." *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 228 F.Supp.2d 348, 356-57 (S.D.N.Y. 2002). The litigation thus proceeded in federal court. By the time this suit was dismissed based on *Garamendi* the ICHEIC deadline had closed.

Garamendi suggests that preemption is appropriate in such circumstances, especially in a situation like this where there is no executive agreement with a foreign nation and the foreign nation does not object to the suit.

To leave plaintiffs with no forum for their state law claims and no possibility of relief raises serious constitutional issues. *See, e.g., Reno v. Catholic Social Services*, 509 U.S. 43, 63 (1993); *Oestereich v. Selective Service System, Local Board 11*, 393 U.S. 233, 243-44 (1968) (Harlan, J., concurring) (need to interpret federal laws to ensure availability of forum for claims). This Court has been clear that preclusion of all remedies requires a clear statement from Congress, something obviously not present here. As this Court noted, it is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). *See also Medtronic, Inc. v. Lohr*, 518 U.S. at 487. The Second Circuit's opinion thus raises the question of whether letters from the Department of Justice, in the absence of a statute or even an executive agreement, can have the effect of denying plaintiffs access to the courts when that is their only remedy for a serious injustice.

CONCLUSION

This case presents important issues not addressed or resolved in this Court's decision in *American Insurance Association v. Garamendi*. The Second Circuit expansively interpreted *Garamendi* to preclude state common law claims in the absence of an executive agreement and where no other forum or recourse will be available for plaintiffs. The Second Circuit's decision is reflective of confusion in the lower courts as to the proper scope of *Garamendi*, especially in light of subsequent decisions of this Court. This Court should grant review to resolve these important issues.

Respectfully submitted,

SAMUEL J. DUBBIN
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

ERWIN CHEMERINSKY
Counsel of Record
DUBBIN & KRAVETZ, LLP
University of California,
Irvine School of Law
401 E. Peltason
Irvine, CA 92697-8000
(949) 824-7722
EChemerinsky@law.uci.edu

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G St., NW
Suite 500
Washington, DC 20005
(202) 652-4511

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AND FILED JANUARY 15, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: June 10, 2008 Decided: January 15, 2010)

Docket Nos. 05-5612-cv, 05-5310-cv

In re ASSICURAZIONI GENERALI, S.P.A.

Dr. Thomas Weiss, Erna Birnbaum Gottesman and Martha Birnbaum Younger,

Plaintiff-Appellants,

v.

Assicurazioni Generali, S.p.A.,

Defendant-Appellee.

Edward David, as Personal Representative of the Estate of David David,

Plaintiff-Appellant,

v.

Appendix A

Assicurazioni Generali, S.p.A.,

*Defendant-Appellee.**

LEVAL, *Circuit Judge*:

Plaintiffs Dr. Thomas Weiss, Erna Birnbaum Gottesman, and Martha Birnbaum Younger ("the Weiss Plaintiffs") and Plaintiff Edward David ("David") appeal from the judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*), which dismissed their claims. Plaintiffs are beneficiaries of insurance policies purchased by their ancestors in the years leading up to the Holocaust from Defendant Assicurazioni Generali, S.p.A. ("Generali"), an Italian insurance company. Plaintiffs brought state-law claims alleging breach of the insurance contracts, based on Generali's refusal to pay benefits under those policies. These cases and others were consolidated for pre-trial proceedings. The district court granted Generali's motion to dismiss based on the Supreme Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003), which held that the Plaintiffs' state-law claims were preempted by the foreign policy of the United States, which favors resolution of Holocaust-era insurance claims in the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), an international claims resolution organization founded by private insurance companies

---

* The Clerk of Court is instructed to amend the official caption as set forth above.

and supported by the United States and other foreign government entities. Because we agree with the district court that *Garamendi* controls this case, we affirm.

BACKGROUND

Generali was founded by Jewish merchants in 1831 in Trieste, Italy. In the time between World War I and World War II, Generali operated in Austria, Hungary, Czechoslovakia, Poland, and Yugoslavia. In the late between-Wars period, many families purchased insurance policies from Generali believing this would provide protection against the rise of Nazi power. According to the complaints, Generali betrayed the policyholders by cooperating with the Nazi regime and refusing to pay the beneficiaries of the insurance policies purchased by Jews and other persecuted minorities.

After World War II, when the victorious Western Allies took steps to reestablish the sovereignty of the defeated Germany, there was a concern that reparations would economically cripple the new Federal Republic of Germany. *Garamendi*, 539 U.S. at 403. In the London Debt Agreement, the allies agreed to "put off consideration of claims arising out of the second World War . . . until the final settlement of the problem of reparation." *Id.* at 403-04 (internal quotation marks and brackets omitted). Notwithstanding this moratorium, the German government paid out over 100 billion Deutsche marks in reparations as of 2000. *Id.* at 404. Those payouts, however, did not cover certain claimants and certain types of claims. *Id.* In 1996, the German

courts interpreted the treaty reunifying East and West Germany as "lifting the London Debt Agreement's moratorium on Holocaust claims by foreign nationals." *Id.* at 405. After this decision, many lawsuits that could not have been brought previously were filed against companies doing business in Germany during the Nazi era.

In July 2000, the United States announced an agreement with Germany in which the German government agreed to enact legislation to establish a foundation that would be used to compensate all victims who suffered at the hands of German companies during the Nazi era. *Id.* In return, the United States agreed that whenever a German company was sued on a Holocaust-era claim in an American (state or federal) court, the government of the United States would submit a statement of interest to the court explaining that "it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Garamendi*, 539 U.S. at 406 (internal quotation marks omitted) (quoting 39 Int'l Legal Materials 1298, 1303 (2000)). The "German Foundation pact" was a model for similar agreements with Austria and France. There was however, no similar agreement with Italy.

With respect to insurance claims, the agreement specified that the German foundation would work with the ICHEIC to handle insurance claims. The ICHEIC was formed in 1998 by "several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners," *id.* at 406-07, to negotiate with European insurers to provide information about unpaid policies issued to Holocaust victims between 1920 and 1945, and to settle any claims that arose in the Holocaust era under these policies, *id.* at 407; ICHEIC, Memorandum of Understanding ¶ 4 (Aug. 25, 1998), *available at* http://www.icheic.org/pdf/ICHEIC_MOU.PDF. To date approximately $300 million dollars have been offered or awarded to more than 48,000 claimants as a result of the ICHEIC process. *See* ICHEIC, http://www.icheic.org (last visited Dec. 17, 2009).

PROCEDURAL HISTORY

The Weiss Plaintiffs filed suit in Florida state court, which Generali removed to federal court. David filed suit in the Eastern District of Wisconsin. Both complaints sought damages for unpaid insurance claims under policies issued by Generali between 1920 and 1941. In November 2000, these suits, together with numerous others, were transferred by the Judicial Panel on Multidistrict Litigation to the district court for the Southern District of New York for consolidated pre-trial proceedings. In an initial opinion, issued prior to the Supreme Court's decision in *Garamendi*, the district court denied Generali's motion to dismiss on *forum non*

conveniens grounds. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348 (S.D.N.Y. 2002).

In 2003, the Supreme Court decided *Garamendi*. In that case, a trade association and a group of insurance companies, including Generali, brought suit seeking to enjoin enforcement of California's Holocaust Victim Insurance Relief Act ("HVIRA"), which required insurers to disclose the details of insurance policies sold in Europe between 1920 and 1945 or face suspension of its license to do business in the state. *Garamendi*, 539 U.S. at 409-10. The United States filed an *amicus* brief stating as its foreign policy that the ICHEIC should be the exclusive remedy for insurance claims based on policies from the Holocaust era. Brief of the United States as *Amicus Curiae* Supporting Petitioners at 2-3, *Garamendi*, 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (No. 02-722), 2003 WL 721754. The Supreme Court ruled that the HVIRA interfered with and was therefore preempted by the foreign policy of the United States to "encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* at 421.

Relying on *Garamendi*, the district court dismissed all actions in October 2004. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494 (S.D.N.Y. 2004). Each plaintiff filed a separate appeal. The class action plaintiffs in the consolidated proceedings entered into a settlement agreement with

Generali.[1] We then stayed all the remaining appeals. *In re Assicurazioni Generali, S.p.A.*, No. 05-5602-cv *et al.* (2d Cir. Sept. 11, 2006) (order). In November 2007, we lifted the stay on the appeals by the plaintiffs in the nineteen remaining non-class action cases. *In re Assicurazioni Generali S.p.A.*, No. 04-6161-cv *et al.* (2d Cir. Nov. 7, 2007) (order).

After oral argument, we requested the advice of Secretary of State Condoleezza Rice "on the question whether court adjudication of [the] Holocaust era claims against Generali would conflict with the foreign policy of the United States." *In re Assicurazioni Generali S.p.A.*, No. 05-5602-cv *et al.* (2d Cir. Aug. 1, 2008) (letter). The Government responded that "[i]t has been and continues to be the foreign policy of the United States that the [ICHEIC] should be regarded as the exclusive forum and remedy for claims within its purview" and that claims against Generali, as "one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address." Letter of Sharon Swingle, Oct. 30, 2008 ("Swingle Letter"), at 1. Because of the possibility of change of foreign policy after the intervening change of administration in 2009, we then inquired of the new Secretary of State Hillary Rodham Clinton whether, in the new administration, the foreign policy of the United States continued unchanged, *In re Assicurazioni*

---

1. After further proceedings, approval of that settlement was affirmed by our court. *Rubin v. Assicuazioni Generali S.p.A.*, 290 F. App'x 376 (2d Cir. 2008).

Generali S.p.A., Nos. 05-5612-cv, 05-5310-cv (2d Cir. July 29, 2009) (letter), and received a response that the position of the United States "continues to be that set out in [its] original letter brief," Letter of Benjamin M. Shultz, Oct. 27, 2009 ("Shultz Letter"), at 1. In March 2009, all plaintiffs other than the Weiss Plaintiffs and David settled with Generali, and their appeals were dismissed. *In re Assicurazioni Generali S.p.A.*, No. 05-5612-cv *et al.* (2d Cir. Mar. 6, 2009) (order).

DISCUSSION

We review *de novo* a district court's application of preemption principles. *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009).

I. Applicability of *Garamendi*

In *Garamendi*, the Supreme Court explained that state law "must give way" to the foreign policy of the United States, as set by the President, where there is "evidence of clear conflict between the policies adopted by the two." *Garamendi*, 539 U.S. at 420-21. Based on the *amicus* brief of the United States and statements made during negotiations between the United States and Germany, Austria, and France regarding Holocaust-era insurance claims, the Court concluded that the "consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions," and, in the insurance context specifically, "to encourage European insurers to work

with the ICHEIC to develop acceptable claim procedures." *Id.* at 421.

California's HVIRA. "by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure," which required broader disclosure than the ICHEIC, "undercut[] the President's diplomatic discretion and the choice he . . . made in exercising it." *Id.* at 423-24. Because enforcement of the California law would mean that the President could not wield the full "'coercive power of the national economy'" as a tool of diplomacy in negotiating a process for settling claims, the Court concluded that the HVIRA "'compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims against European companies arising out of World War II." *Id.* at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377, 381, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)).

Garamendi involved only disclosure requirements. The HVIRA's disclosure requirement, although not directly in conflict with government's policy to encourage use of the ICHEIC to resolve Holocaust-era insurance claims, nonetheless undermined the Government's objective by "thwarting the Government's policy of repose for companies that pay through the ICHEIC" and by undercutting privacy protections of European allies. *Id.* at 425. The Court therefore found it sufficiently disruptive to justify preemption. The cases

before us, in contrast, essentially seek enforcement of the plaintiffs' claimed contract rights against Generali under state law. Unlike the HVIRA's disclosure requirement, whose effect on foreign policy is only oblique, such law suits are *directly* in conflict with the Government's policy that claims should be resolved exclusively through the ICHEIC. If, as the Supreme Court held in *Garamendi*, a state disclosure requirement conflicts sufficiently to be preempted by the national foreign policy of channeling Holocaust-era insurance claims through the ICHEIC, then, *a fortiori*, a state law suit to enforce a Holocaust-era insurance claim is preempted by that policy, as well.

Plaintiffs put forward several arguments in an effort to distinguish *Garamendi*. First, they point out that Generali is an Italian company and that Italy, unlike Germany, Austria, and France, has not entered an executive agreement with the President of the United States regarding the processing of Holocaust-era insurance claims. The Court in *Garamendi*, however, did not find that the United States policy of encouraging resolution of Holocaust-era insurance claims through the ICHEIC depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it. *See, e.g., id.* at 421-22 (stating that the agreements "illustrate" and "express[]" the President's policy, and quoting statements of officials regarding the policy underlying

the agreements, in describing "evidence" of the policy). A further indication that the Court did not view the existence of an executive agreement as a prerequisite is that Generali was one of the plaintiffs in *Garamendi*, and was not excluded from the judgment on the ground that it is an Italian company and Italy is not party to an executive agreement.[2]

In any event, to erase any such doubt, we solicited the advice of the Secretary of State (in two administrations) on the foreign policy of the United States. The Government has twice made perfectly clear that "[i]t has been and continues to be the foreign policy of the United States that the [ICHEIC] should be regarded as the exclusive forum and remedy for claims within its purview," and that this policy applies to claims against Generali. Shultz Letter at 1; Swingle Letter at 1.

Plaintiffs next argue that strong state interests underlie the laws that form the basis for their suit, and therefore, unlike in *Garamendi*, the balance between state and federal policy tips in their favor. This argument is premised on a misunderstanding of *Garamendi* and preemption law. As the *Garamendi* Court reaffirmed, "[an] express federal policy and [a] clear conflict raised by [a] state statute are alone enough to require state

2. We find nothing inconsistent with this position in the reference in *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008), to "cases in which [the Supreme Court] has upheld the authority of the President to settle foreign claims pursuant to an executive agreement." *Id.* at 1371.

law to yield." *Garamendi*, 539 U.S. at 425. The Court went on to note that, if the conflict were less clear, it would nevertheless be resolved in the federal government's favor because of the weakness of the state's interest in regulating disclosure of Holocaust-era insurance policies. *Id.* In this case, the conflict between the federal policy that the ICHEIC should be the exclusive forum for resolving Holocaust-era insurance claims and Plaintiffs' attempt to adjudicate their Holocaust-era insurance claims under state law is even more clear than the conflict in *Garamendi*, which involved only a disclosure requirement, and not a state law suit to enforce the insurance claim. The state law must yield to the federal policy, regardless of the importance of the interests behind the state law.

Finally, Plaintiffs point out that the ICHEIC's December 31, 2003 deadline for accepting claims has passed, so that dismissal of their claims will deny them the opportunity to pursue those claims in any forum. This argument is premised on a misunderstanding of the Government's policy. As the Government made clear in its letters to the court, "[i]t was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process." Swingle Letter, at 8. The policy is rather that the ICHEIC "should be regarded as the *exclusive* forum and remedy for claims with its purview." *Id.* at 1 (emphasis added). Permitting state-law claims to proceed now that ICHEIC has ceased operations directly conflicts with that policy goal. *See id.* at 8 ("[I]t would undermine future efforts to secure voluntary

compensation agreements if ICHEIC participants became subject to litigation as soon as ICHEIC had concluded."); Shultz Letter, at 5. If the ICHEIC door has closed on plaintiffs, it is because they chose to allow it to close.[3]

Accordingly, we hold under authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States.

II. The Weiss Plaintiffs' Motion to Amend

The Weiss Plaintiffs argue that the district court erred in denying their motion after judgment to amend their complaint to add a claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The filing of an amended complaint is not permissible once a judgment is entered unless the judgment is set aside or vacated pursuant to Rule 59 of the Federal Rules of Civil Procedure. *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d Cir. 1991). A district court's denial of a Rule 59 motion to alter or amend a judgment is reviewed for abuse of discretion. *See State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418

3. In any event, it is apparently not entirely correct that the ICHEIC process is closed. The Government's letter informs us that Generali and other ICHEIC participants have agreed to continue processing claims according to the relaxed standards of proof developed by the ICHEIC. Shultz Letter, at 4-5.

(2d Cir. 1990). When the plaintiff had the opportunity to amend the complaint earlier but waited until after judgment, a court may "exercise its discretion more exactingly." *Id.* Generally, district courts will only amend or alter a judgment pursuant to Rule 59 "to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) (internal quotation marks omitted).

The Weiss Plaintiffs give no good reason for failing to seek leave to amend earlier in the case. Indeed, the record indicates that they contemplated adding a RICO claim at least three years before the court entered judgment. The district court acted well within its discretion in denying the motion.

III. David's Allegation of a Cancelled Policy

In his brief on appeal, David contends that his complaint shows that his ancestor's insurance policy was "cancelled prior to the Holocaust Era as that era is defined by the ICHEIC rules" and therefore his claim was not eligible for adjudication by the ICHEIC. Although the ICHEIC generally covers claims based on policies sold between 1920 and 1945, it does not cover claims based on policies that were cancelled prior to the start of the "Holocaust era" as defined in its claims-processing rules. *See* ICHEIC, Processing Guide, at 32, 46 (June 22, 2003), *available at* http://www.icheic.org/pdf/ICHEIC_CPG.pdf. The ICHEIC Processing Guide identifies the start of the Holocaust era in Poland, where David's ancestor lived, as 1939. *Id.* at 51. The United

States, in its first letter to this court, noted that adjudication of a lawsuit arising out of an insurance policy cancelled before the Holocaust era (as defined by the ICHEIC) does not conflict with foreign policy. Swingle Letter, at 9 n.5.

David's complaint is unclear as to potentially determinative aspects of the timing of his ancestor's death and the duration of the insurance policy. The complaint alleges that David's insured ancestor "died in a concentration camp as the result of actions of Nazi Germany" and that "the policy was in full force and effect and all premiums were current at the time of his death," while also alleging that Generali advised David in 1999 that the policy was cancelled "sometime prior to 1936." There is no clear allegation that David's claim falls outside the Holocaust era as defined by the ICHEIC and therefore was not subject to adjudication by that body. Accordingly, we affirm the district court's dismissal of the complaint. On the other hand, it may be that the claim, although inartfully pleaded, in fact falls outside the scope of the ICHEIC process. We instruct the district court to permit David to replead if, consistent with the requirements of Rule 11 of the Federal Rules of Civil Procedure, he is able to plead a claim that falls outside the scope of the ICHEIC.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court. With respect to Plaintiff David, the district court is instructed to permit the filing of an amended complaint, if the new pleading conforms to the requirement set forth in this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 14, 2004

United States District Court,
S.D. New York.

No. MDL 1374.

No. M21-89MBM.

In re: ASSICURAZIONI GENERALI S.P.A. HOLOCAUST INSURANCE LITIGATION

This Disposition Applies to All Actions.

Oct. 14, 2004.

OPINION AND ORDER

MUKASEY, District Judge.

Plaintiffs in twenty separate actions have sued Assicurazioni Generali S.p.A. ("Generali"), an Italian insurer that wrote insurance policies in Europe in the years before and during World War II.[1] The gravamen

1. Of the twenty actions, two were filed initially in this court: *Cornell v. Assicurazioni Generali S.p.A.*, 97 Civ. 2262 (class action); and *Schenker v. Assicurazioni Generali S.p.A.* (formerly *Winters v. Assicurazioni Generali*), 98 Civ. 9186 (class action). Sixteen were transferred to this court by the Panel on (Cont'd)

of the actions is that Generali failed to pay benefits following the death of the policy holders or damage to their property during the German campaign of genocide known as the Holocaust. Plaintiffs, assertedly the policy beneficiaries or their surviving family members, have advanced numerous claims seeking damages for Generali's non-payment of benefits, as well as ancillary claims predicated on other alleged misconduct. The claims arise under the statutes and common law of New York, Wisconsin, Florida, and California, as well as

---

(Cont'd)
Multidistrict Litigation ("MDL Panel") under Docket No. 1374: *Brauns v. Assicurazioni Generali S.p.A.*, 00 Civ. 9412; *Smetana v. Assicurazioni Generali S.p.A.*, 00 Civ. 9413 (class action); *Mandil v. Assicurazioni Generali S.p.A.*, 00 Civ. 9414; *Weiss v. Assicurazioni Generali S.p.A.*, 00 Civ. 9415; *David v. Assicurazioni Generali S.p.A.*, 00 Civ. 9416; *Szekeres v. Assicurazioni Generali S.p.A.*, 01 Civ. 0158; *Lightner v. Assicurazioni Generali S.p.A.*, 01 Civ. 0160; *Sladek v. Assicurazioni Generali S.p.A.*, 01 Civ. 6193; *Haberfeld v. Assicurazioni Generali S.p.A.*, 01 Civ. 9498 (class action); *Lantos v. Assicurazioni Generali S.p.A.*, 03 Civ. 6356; *More v. Assicurazioni Generali S.p.A.*, 03 Civ. 6358; *Pioro v. Assicurazioni Generali S.p.A.*, 03 Civ. 6359; *Sorter v. Assicurazioni Generali S.p.A.*, 03 Civ. 636; *Ungar v. Assicurazioni Generali S.p.A.*, 03 Civ. 6193; *Weiss/Friedman v. Assicurazioni Generali S.p.A.*, 03 Civ. 6360; and *Zada v. Assicurazioni Generali S.p.A.*, 03 Civ. 6355. *Anderman v. Federal Republic of Austria*, 02 Cv. 8379 (class action), was transferred by the MDL Panel to this court under Docket No. 1337. *Tabaksman v. Assicurazioni Generali S.p.A.*, 01 Civ. 7826, was removed to this court from New York State Supreme Court.

customary international law.[2] A list of the claims is set forth in the Appendix at the end of this opinion.

Generali previously moved to dismiss on grounds of *forum non conveniens* and contractual forum selection. In connection with that motion, Generali argued, *inter alia*, that the balance of conveniences required dismissal of the actions in favor of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), a private commission established by several European insurance companies (including Generali), certain nongovernmental Jewish organizations, the State of Israel, and domestic state insurance regulators, to resolve unpaid Holocaust-era insurance claims. I denied **Generali's** motion by opinion and order dated September 25, 2002, finding, with respect to the application to dismiss the actions in favor of ICHEIC, that that body is an inadequate alternative forum for litigation of plaintiffs' claims. *See In re Assicurazioni* **Generali** S.p.A. Holocaust Insurance Litig., 228 F.Supp.2d 348, 355-58 (S.D.N.Y.2002) (hereinafter, *"http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&Find*

2. Plaintiffs in the *Cornell, Schenker,* and *Tabaksman* actions allege also violations of "international treaties" (*Cornell* Compl. ¶¶ 49-51; *Schenker* Compl. ¶¶ 64-66; Tabaksman Compl. ¶¶ 39-41), but fail to identify in their respective complaints the treaties upon which the alleged violations are premised. Nor do their motion papers address independent violations of international treaties. Accordingly, plaintiffs' claims premised on Generali's violations of international treaties are deemed abandoned.

*Type=Y&Serial Num=2002614092*Generali *I*"). Familiarity with *Generali* I is assumed for present purposes.[3]

With the court's permission, Generali now moves to dismiss or strike, and/or for judgment, on various additional grounds. In light of the Supreme Court's decision in *American Insurance Association v.* Garamendi, 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003), it appears that the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC. Plaintiffs' ancillary claims, in turn, are not actionable because it appears that they do not allege any cognizable injury other than that caused by Generali's non-payment of benefits, redress for which is committed to ICHEIC. Accordingly, Generali's motion to dismiss is granted with respect to all actions.

---

3. The MDL Panel transferred the *Lantos, More, Pioro, Sorter, Ungar, Weiss/Friedman,* and *Zada* actions, and the portion of *Anderman* alleging claims against Generali, to this court after *Generali* I was issued (*see* Docket Nos. 52, 100), and thus those actions are not referenced in my earlier opinion. Claims against other defendants in *Anderman* were transferred to the Central District of California and subsequently dismissed by that Court. *See Anderman v. Federal Republic of Austria,* 256 F.Supp.2d 1098, 1116 (C.D.Cal.2003).

Appendix B

I.

A. *Facts in* Garamendi

At issue in *Garamendi* was the constitutionality of a California statute, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), which imposed disclosure requirements on all insurers operating in that state that sold insurance policies to persons in Europe between 1920 and 1945. 123 S.Ct. at 2383-84 (citing Cal. Ins.Code Ann. § 13804(a) (West Cum.Supp.2003)). HVIRA required each such insurer to report to the California insurance commissioner how many policies it had issued during the relevant period, the current status of each policy, and the names of the beneficiaries, and directed the insurance commissioner to place the information in a central public registry. *Id.* (citing Cal. Ins.Code Ann. §§ 13803, 13804(a)). The mandatory penalty for default was suspension of the insurer's license to do business in the State. *Id.* (citing Cal. Ins.Code Ann. § 13806).

The *Garamendi* plaintiffs, an insurance industry trade association and several insurance companies, sued to enjoin enforcement of HVIRA, arguing, *inter alia*, that the statute interfered with the foreign policy of the United States, implemented by the Executive Branch, as expressed principally although not exclusively in certain executive agreements between the President and the leaders of Germany, France, and Austria. *Id.* at 2386. These agreements were the result of efforts at the national level to achieve a mediated settlement of numerous Holocaust-related lawsuits filed in this

country's courts against companies doing business in Germany during the Nazi era. *Id.* at 2381.

The Court's discussion of the executive agreements focused primarily on the agreement with Germany, the Agreement Concerning the Foundation "Remembrance, Responsibility and the Future" (the "German Foundation Agreement"). Pursuant to that agreement, the German government and German companies undertook to contribute 10 billion deutschmarks to the German Foundation, a fund used to compensate persons "who suffered at the hands of German companies during the National Socialist era." *Id.* at 2381 (quoting German Foundation Agreement, July 17, 2000, U.S.-F.R.G., 39 Int'l Legal Materials ("I.L.M.") 1298, 1298 (2000)). In exchange, the United States government (the "Government") agreed to file in all cases involving Holocaust-era claims against German companies a statement of interest expressing the view that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Id.* at 2382 (quoting German Foundation Agreement, 39 I.L.M. at 1303). Although the Government declined to guarantee that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," it agreed to tell courts "that U.S. policy interests favor dismissal on any valid legal ground." *Id.* (quoting German Foundation Agreement, 39 I.L.M. at 1304). The Government pledged also to use its "best efforts, in a

manner it considers appropriate," to persuade state and local governments to respect the German Foundation as the exclusive mechanism for resolving Holocaust-era claims against German companies. *Id.* (quoting German Foundation Agreement, 39 I.L.M. at 1300, 1303-04).

As to insurance claims specifically, the United States and Germany "agreed that the German Foundation would work with the [ICHEIC]," and Germany stipulated that such claims would be processed in accordance with procedures negotiated with ICHEIC. *Id.* at 2382. In a supplemental agreement, the German Foundation agreed to set aside funds for claims against German insurers approved by ICHEIC, to contribute additional sums to a humanitarian fund administered by ICHEIC, and to work with German insurers that had joined ICHEIC to publish lists of holders of insurance policies issued by German companies who may have been Holocaust victims. *Id.* at 2383 (citations omitted).

The German Foundation Agreement served as the model for similar agreements with France and Austria, although the agreement with France did not address separately the matter of insurance claims. *Id.* at 2383 n. 3.[4]

4. The executive agreements with Austria and France are: the Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation"; the Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and (Cont'd)

B. *The Court's Ruling*

The Court ruled that HVIRA was preempted by an Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.

In reaching this conclusion, the Court began by describing the federal government's supremacy over the States in conducting the Nation's foreign policy and, within the federal government, the President's predominant role in formulating that policy. *Id.* at 2386 ("There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy. . . . Nor is there any question generally that there is executive authority to decide what that policy should be."). Consistent with this allocation of power in the realm of foreign affairs, the Court had upheld in previous cases the President's authority to make executive agreements with other countries that settled individual claims filed against foreign governments.

> Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice. . . . Given the fact that the practice

---

(Cont'd)

Cooperation"; and the Agreement Between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffering During World War II. *See Garamendi*, 123 S.Ct. at 2383 n. 3.

> goes back over 200 years to the first Presidential administration, and has received congressional acquiescence throughout its history, the conclusion "[t]hat the President's control of foreign relations includes the settlement of claims is indisputable."

Id. at 2387 (quoting *United States v. Pink*, 315 U.S. 203, 240, 62 S.Ct. 552, 86 L.Ed. 796 (1942)) (Frankfurter, J., concurring) (additional citations omitted). The Court reasoned that this executive power to settle claims against foreign governments extends also to claims brought against foreign companies because drawing "a sharp line between public and private acts . . . in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies." *Id.* The Court thus concluded that "[g]enerally, valid executive agreements are fit to preempt state law, just as treaties are. . . ." *Id.* at 2387-88 (citing *United States v. Belmont*, 301 U.S. 324, 327, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); *Pink*, 315 U.S. at 223, 62 S.Ct. 552).

The Court next observed that resolving Holocaust-era insurance claims is a matter "well within the Executive's responsibility," inasmuch as the claims implicated the Nation's foreign affairs. *Id.* at 2390.

> Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations between the countries

> involved," . . . there is a longstanding practice of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries. . . . The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state interests are overriding, and which the National Government has addressed.

Id. (citations omitted).

Turning to the constitutionality of HVIRA, the Court held that the statute was preempted by an executive policy reflected in the executive agreements with Germany, Austria and France, and in various statements by Executive Branch officials. With respect to Holocaust claims generally, the Court found in the "negotiations toward the three settlement agreements," a "consistent Presidential foreign policy" of "encourag[ing] European governments and companies to volunteer settlement funds in preference

to litigation or coercive sanctions." *Id.* at 2390, 123 S.Ct. 2374. With respect to insurance claims specifically, the Court found that "the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with ICHEIC to develop acceptable claim procedures, including procedures governing disclosures of policy information." *Id.* (citing provision in German Foundation Agreement declaring German Foundation to be "exclusive forum" for demands against German companies and agreeing to have insurance claims resolved through proceduresnegotiated with ICHEIC; and same in agreement with Austria). The Court observed further that "this position, of which the agreements are exemplars, has also been consistently supported in the high levels of the Executive Branch," and cited statements by Deputy Treasury Secretary Stuart Eizenstat, the Government's principal representative on Holocaust issues in the Clinton administration, and Ambassador Randolph Bell, Special Envoy for Holocaust issues in the Bush administration, to the effect that ICHEIC is the only effective means of processing unpaid Holocaust-era insurance claims quickly and completely and thus should be considered the "exclusive remedy" for resolving such claims. *Id.* at 2390-91. Here, the Court explicitly rejected the view, expressed by the dissent, that Executive Branch statements by sub-Cabinet level officials are insufficient as a basis for determining the Executive Branch's position. *See id.* at 2391 n. 13 (noting that "[t]here is no suggestion that these high-level executive officials were not faithfully representing the

President's chosen policy, and there is no apparent reason for adopting [a] 'nondelegation' rule to apply within the Executive Branch").

In contrast to the executive policy favoring voluntary settlement of Holocaust-era claims through ICHEIC, the Court found that the California legislature, in enacting HVIRA, "ha[d] taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." *Id.* at 2391. By reducing the President's economic and diplomatic leverage, HVIRA's disclosure requirement "'compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve claims against European companies arising out of World War II." *Id.* at 2391-92 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000)). Although HVIRA and the Executive Branch shared the goal "of obtaining compensation for Holocaust victims," the statute was "an obstacle to the success of the National Government's chosen 'calibration of force' in dealing with the Europeans using a voluntary approach." *Id.* at 2392 (quoting *Crosby*, 530 U.S. at 380, 120 S.Ct. 2288). The Court concluded:

> The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter

> of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."

Id. at 2393 (quoting *Crosby*, 530 U.S. at 386, 120 S.Ct. 2288) (alteration in *Garamendi*).

II.

The Supreme Court's decision in *Garamendi* compels dismissal of plaintiffs' claims seeking damages for Generali's non-payment of policy benefits. The dispositive force of the ruling is most evident in relation to plaintiffs' benefits claims arising under state Holocaust statutes, like HVIRA, designed to foster litigation of Holocaust-era insurance claims. *Cf.* Tex. Atty. Gen. Op. GA-0116, 2003 WL 22451383, at *6 (Oct. 20, 2003) (concluding on basis of *Garamendi* that Texas statute featuring "virtually identical provisions" to HVIRA "interferes with the President's conduct of foreign affairs, and is thus

preempted by the United States Constitution").[5] However, the Court's decision requires dismissal also of the benefits claims arising under generally applicable state statutes and common law as well as customary international law. Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC. The salient fact for present purposes is that plaintiffs seek to obtain redress for Generali's non-payment of policy benefits by filing lawsuits in this country's courts; the legal justification for such claims is irrelevant. *Cf. Boyle v. United Technologies Corp.*, 487 U.S. 500, 508, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) (noting that in some cases where uniquely federal interest displaces state law, "the entire body of state law applicable to the area conflicts and is replaced by federal rules") (citing *Clearfield Trust v. United States*, 318 U.S. 363, 366-67, 318 U.S. 744, 63 S.Ct. 573, 87 L.Ed. 838 (1943)). In short, following *Garamendi*, it appears that plaintiffs cannot use the courts to obtain recovery of benefits due under Holocaust-era policies, regardless of the theory of recovery.

---

5. Plaintiffs assert claims under HVIRA (*Anderman* Compl. ¶¶ 462-74) and Florida's Holocaust Victims Insurance Act, Fla. Stat. § 626.9543 (Cum.Supp.2003) (*Weiss* Compl. ¶¶ 123-34). In addition, plaintiffs in the *Cornell* and *Schenker* actions borrow from certain provisions in New York's Holocaust Victims Insurance Act of 1998, N.Y. Ins. Law §§ 2701-11 (Consol.2000), in alleging unfair business practices. (*Cornell* Compl. ¶¶ 83-84; *Schenker* Compl. ¶¶ 102-03); In *Garamendi*, the Court listed the New York and Florida statutes, among others not implicated in this litigation, as being "similar to HVIRA." 123 S.Ct. at 2385 n. 6.

Appendix B

There is little question that an executive policy can have such broad preemptive effect over the laws on which plaintiffs' benefits claims are based. As discussed above, the Court observed in *Garamendi* that resolving Holocaust-era insurance claims is a matter "well within the Executive's responsibility for foreign affairs," and that that responsibility includes the power to settle claims against foreign companies pending in this country's courts. 123 S.Ct. at 2387, 2390. More generally, the Supreme Court has endorsed repeatedly, including in *Garamendi*, the notion of executive primacy in the sphere of foreign affairs. *See, e.g., Garamendi*, 123 S.Ct. at 2386 (noting that "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations' ") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring)); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (the President has "unique responsibility" for the conduct of "foreign and military affairs"); *Dep't of the Navy v. Egan*, 484 U.S. at 518, 529 (1988) (noting "the generally accepted view that foreign policy [is] the province and responsibility of the Executive") (quoting *Haig v. Agee*, 453 U.S. 280, 293-94, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981)); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109, 68 S.Ct. 431, 92 L.Ed. 568 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in

foreign affairs. . . ."); *United Statesv. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (1936) (referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress").

Certain plaintiffs argue that giving such broad preemptive effect to the executive policy favoring ICHEIC resolution is improper because "the wholesale destruction of [their] claims implicates constitutionally protected due process, property, and contract rights." (Surreply of Plaintiffs Lantos, More, Pioro, Sorter, Ungar, Weiss-Friedman, and Zada (hereinafter, "Surreply of Plaintiffs Lantos et al."), at 7-8) They point to a footnote in *Garamendi* stating that executive preemption of state law is "subject . . . to the Constitution's guarantees of individual rights." (*Id.* at 7 (quoting *Garamendi*, 123 S.Ct. at 2387 n. 9)). To be sure, it is a "well-established" principle in epreemption doctrine that " 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.' " *Boos v. Barry*, 485 U.S. 312, 324, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (quoting *Reid v. Covert*, 354 U.S. 1, 16, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957)). However, to assert this general principle, without more, is merely to raise the question of whether executive preemption of state laws on which plaintiffs rely causes constitutional harm; it does not settle that inquiry in plaintiffs' favor. In view of the President's

settled authority to extinguish legal claims that have a bearing on the Nation's foreign relations, discussed above, plaintiffs' objection fails. Thus, whatever the 'individual rights' limitations on executive preemption intended by the *Garamendi* footnote, no such rights are implicated in holding that the state laws under which plaintiffs' benefits claims arise are preempted by the executive policy favoring ICHEIC resolution.[6]

Nor is there any serious doubt that the executive policy favoring ICHEIC resolution of Holocaust-era insurance claims extends to claims against Generali in particular. The *Garamendi* opinion refers generally to

---

6. Nothing here forecloses the possibility that enforcement of the executive policy favoring ICHEIC resolution causes a taking of property without just compensation, thus violating the Fifth Amendment of the United States Constitution. Plaintiffs may decide at the appropriate time to bring a "taking" action in the Court of Federal Claims. *See Dames & Moore v. Regan*, 453 U.S. 654, 688-89, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981) (where President suspended plaintiffs' claims against Iran in favor of claims tribunal, holding that parties whose valid claims were not adjudicated or not fully paid may bring a "taking" claim against United States in the Court of Claims). *Cf. McKeel v. Islamic Republic of Iran*, 722 F.2d 582,590 (9th Cir.1983), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984) (declining to hold that Claims Settlement Agreement with Iran was invalid because it took appellants' property rights, on ground that "the availability of redress in the Claims Court satisfies the constitutional requirement of an adequate provision for compensation") (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-36, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974)).

"European insurers" in describing the policy at issue, *see* 123 S.Ct. at 2390 ("As for insurance claims in particular, the national position . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures . . . ."), and nowhere distinguishes between Generali and other European insurers that wrote Holocaust-era policies. This is significant because Generali was one of the petitioners in *Garamendi* and the respondent, the California insurance commissioner, referred to Generali repeatedly in its briefs and at oral argument. (*See*excerpts from Respondent's Briefs and Transcript of Oral Argument, Generali's Response to Plaintiffs' Surreply Memoranda Ex. 3, *passim*) Moreover, Generali arguably is the most prominent insurance company defendant in Holocaust-era lawsuits filed in U.S. courts. *See* Michael Bazyler, Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry, 28 Brooklyn J. Int'l Law 683, 705 (2003) (describing Generali as "[t]he European insurance company with the most notoriety in the field of Holocaust-era restitution"); Michael Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. Rich. L.Rev. 1, 97 n. 388 (2000) ("Because Generali was the largest seller of insurance to Jews prior to World War II, it is listed as either the lead or only defendant in most of the Holocaust-era insurance lawsuits filed in the United States. It has now become well-known in the arena of human rights litigation and among the American Jewish community."). In view of Generali's involvement in *Garamendi* and its significant role in Holocaust-era

litigation generally, the lack of any articulated "Generali exception" in the Court's opinion strongly suggests that the executive policy favoring ICHEIC resolution applies equally to Generali and other European insurers that wrote Holocaust-era policies.

Additional support for the conclusion that the executive policy encompasses claims against Generali may be found in Executive Branch statements promoting ICHEIC resolution as the exclusive remedy for all Holocaust-era insurance claims. For example, in a November 2000 letter from Deputy Secretary Eizenstat to ICHEIC Chairman Eagleburger, the Deputy Secretary acknowledged Generali's agreement to make a contribution to ICHEIC for payment of Holocaust-era insurance claims and "commend[ed] the ICHEIC's untiring efforts to provide a measure of justice to Holocaust survivors and their heirs." (Nov. 28, 2000 Eizenstat Ltr., Generali's Response to Plaintiffs' Surreply Memoranda Ex. 1) In the same letter, the Deputy Secretary observed:

> The U.S. government has supported ICHEIC since its inception in 1998 and believes it should be recognized as the exclusive remedy for resolving all insurance claims that relate to the Nazi era. ICHEIC helps further the United States' interest in maintaining good relations with Israel and with Western, Central and Eastern European nations from which many of the [sic] those who suffered during the Nazi era and World War II come.

(*Id.*) This letter, expressing no hint of a distinction between Generali and other European insurers, suggests that claims against Generali are within the scope of the executive policy.

This conclusion is buttressed by other unequivocal pronouncements of the executive policy cited in the *Garamendi* opinion, *see* 123 S.Ct. at 2390-91 (citing, *inter alia*, Hearing before the Committee on House Banking and Financial Services, 106th Cong., 2d Sess., 173 (2000) (Eizenstat statement that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era"); Hearings on H.R. 2693 before the Subcommittee of Government Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002) (Bell statement to the same effect); Hearing on the Legacies of the Holocaust before the Senate Committee on Foreign Relations, 106th Cong., 2d Sess., 23 (2000) (Eizenstat testimony that a company's participation in ICHEIC should give it " 'safe haven' from sanctions, subpoenas, and hearing relative to the Holocaust period"),[7] as well as numerous submissions to this court. (*See, e.g.*, Sept. 16, 2003 Hearing before the House Committee on Govt. Reform, Generali's Response to Plaintiffs' Surreply Memoranda Ex. 2, at 3 (Bell testimony that "ICHEIC process enjoys today the full

7. Generali was one of the founding members, and remains a member, of ICHEIC.

support of survivors' groups, of major Jewish-American NGOs, and of the Government of Israel, as well as of the Administration")); Nov. 13, 2001 Ltr. from James Bindenagel, Department of State Special Envoy for Holocaust Issues, to William Shernoff, Surreply of Plaintiffs Lantos et al., Ex. B, at 1 ("As a matter of policy, the United States Government believes that the resolution of Nazi-era restitution and compensation matters, including those related to insurance, should be handled through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. Our longstanding policy of support for ICHEIC is based on U.S. interests in obtaining a measure of justice for victims, while preserving and protecting our political and economic relations with our European friends and allies and the State of Israel."); Jun. 18, 2001 Ltr. from Deputy Secretary Richard Armitage to Eagleburger, Simshauser Decl. in Support of Generali's Motion to Dismiss, filed in *Anderman* action, Ex. 2 ("I am pleased to affirm that oftlinethe United States government continues to support the ICHEIC and believes it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II .... ICHEIC helps further U.S. interests by fostering good relations with and among our European allies and the State of Israel."); Hearing before the German Bundestag Committee on Domestic Affairs, Berlin, Feb. 16, 2000, Simshauser Decl. in Support of Generali's Motion to Dismiss, filed in *Anderman* action, Ex. 1, at 14 (Eizenstat testimony same as that before Hearing on the Legacies of the Holocaust, cited *supra*))

Appendix B

Plaintiffs argue that the executive agreements at issue in *Garamendi* do not address claims against Generali, and stress that the United States and Italy have not entered into a comparable agreement governing such claims. (Plaintiffs' Joint Opp'n to Generali's Second Motion to Dismiss at 72; Plaintiffs' Joint Surreply in Opp'n to Generali's Second Motion to Dismiss at 2-4; *Anderman* Plaintiffs' Opp'n to Generali's Motion to Dismiss at 6) However, the *Garamendi* ruling strongly implies that an executive policy need not be formally embodied in an executive agreement in order for the policy to have juridical effect. As discussed above, although the Court found the executive policy favoring ICHEIC resolution to be "expressed unmistakably in the executive agreements signed by the President with Germany and Austria," it found further that "[t]his position, of which the agreements are *exemplars*, has also been consistently supported in the high levels of the Executive Branch, [citing statements by executive officials]."123 S.Ct. at 2390-91 (emphasis added). Although the agreements were said to be "exemplars" of the Executive's position on this issue, evidence of that position was not limited to the agreements. Thus, it was to the Executive's position, and not simply to the agreements, that the Court deferred. I believe that the Court's emphasis on the Executive's position rather than merely on the text of the agreements means that a court seeking to comprehend the substance of an executive policy should not confine its analysis to the text of executive agreements. As already discussed, the statements by executive officials concerning disposition

of Holocaust-era insurance claims show uniformly that the policy favoring ICHEIC resolution applies to claims against Generali.[8]

That I reached in *Generali* I a somewhat different conclusion-one more favorable to plaintiffs' view here-does not salvage their claims. In that earlier opinion, I declined to give conclusive weight to statements by executive officials endorsing ICHEIC resolution, emphasizing that no executive agreement at issue in this case could be read to preclude litigation of such claims in U.S. courts. *See Generali* I, 228 F.Supp.2d at 358 ("Generali's observation that the United States government has several times expressed its view that ICHEIC 'should be considered the exclusive remedy for resolving insurance claims from the World War II era'

8. Plaintiffs are skeptical that statements by executive officials like those at issue here can serve as an independent basis for ascertaining executive policy, and cite to the dissent's view in *Garamendi* that the Court should not "premise [ ] foreign affairs preemption on statements of that order [citing letters by Deputy Secretary Eizenstat] . . . lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch." (Joint Surreply in Opp'n to Generali's Second Motion to Dismiss at 3) (citing *Garamendi*, 123 S.Ct. at 2401 (Ginsburg, J., dissent)). However, as discussed above in the text, the majority in *Garamendi* expressly rejected the dissent's position, noting that "there is no suggestion that these high-level executive officials were not faithfully representing the President's chosen policy, and there is no apparent reason for adopting the dissent's 'nondelegation' rule to apply within the Executive Branch." 123 S.Ct. at 2391 n. 13.

[citation omitted] is irrelevant. Absent a statute or executive agreementsuspending plaintiffs' claims or an executive agreement that gives rise to specific foreign relations concerns . . . , the government's position is not controlling. . . ."). To the extent my earlier ruling conflicts with *Garamendi*, the latter of course controls.

Plaintiffs note also that the Executive Branch has not filed in this litigation a statement of interest, or otherwise intervened to support dismissal of their claims. (Plaintiffs' Joint Opp'n to Generali's Second Motion to Dismiss, at 72; Plaintiffs' Joint Surreply in Opp'n to Generali's Second Motion to Dismiss, at 2; Weiss Plaintiffs' Surreply in Opp'n to Generali's Second Motion to Dismiss, at 4-9; Surreply of Plaintiffs Lantos et al., at 2-4)[9] This argument too is of little consequence.

---

9. One minor caveat is that, prior to the MDL Panel's transfer of claims against Generali in the *Anderman* action, the Government filed a statement of interest stating that dismissal of the case would be in the United States' foreign policy interests. (Statement of Interest of the United States of America in *Anderman v. Fed. Repub. of Austria*) As explained in note 3 above, claims against other defendants in *Anderman*-the Federal Republic of Austria and various Austrian companies-were dismissed by the Central District of California. The *Anderman* plaintiffs and Generali dispute whether the statement of interest was filed on behalf of all defendants named in that action, including Generali, or only on behalf of the Austrian entities. (Generali's Mem. in Support of its Motion to Dismiss, filed in *Anderman*, at 13-14; *Anderman* Plaintiffs' Opp'n to Generali's Motion to Dismiss at 6; Generali's Reply Mem. in Support of its Motion to Dismiss, filed in *Anderman*,

(Cont'd)

Although the Executive Branch is authorized by statute to file a statement of interest in any pending action, *see* 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."), it is not required to file a statement in order for the court to take cognizance of its policy. Moreover, to the extent plaintiffs are suggesting that the Government's failure to intervene in this case suggests its ambivalence towards ICHEIC resolution of claims against Generali, that argument has little to commend it. There is no reason to infer from the mere fact of executive inaction that the policy favoring ICHEIC resolution does not encompass claims against Generali. I note here that the Government's decision to intervene, or not, in a particular case relating to foreign affairs, and what form its intervention should take were it to do so, is informed by a variety of intricate diplomatic and political considerations that make this sort of inferential reasoning by courts a perilous enterprise. *See Chicago & Southern Air Lines v. Waterman S S Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92

(Cont'd)

at 8-9) For the reasons discussed in the text, even assuming the Government filed its statement only on behalf of the Austrian entities, as the *Anderman* plaintiffs contend, that alone cannot be interpreted to mean that the executive policy favoring ICHEIC resolution is inapplicable to the claims against Generali.

L.Ed. 568 (1948) (describing "executive decisions [relating] to foreign policy" as "delicate, complex, and involv[ing] large elements of prophecy"); *Olegario v. United States*, 629 F.2d 204, 232 (2d Cir.1980); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir.1974) (noting that "[t]he executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary") (citing *Waterman S S*, 333 U.S. at 111, 68 S.Ct. 431 (1948); *Curtiss-Wright*, 299 U.S. at 320, 57 S.Ct. 216).

Furthermore, the parties' submissions indicate that, if anything, the Executive Branch's decision not to file a statement of interest in this case appears to stem from an unwillingness to act on behalf of a private company absent a government-to-government agreement encompassing claims against the company in question. Thus, when the issue of governmental intervention on behalf of private companies was raised in a November 2000 ICHEIC meeting, ICHEIC Chairman Eagleburger responded as follows:

> If what is essential for the [private] companies is a legal peace that is sought by the United States government, they will not get it. The U.S. government will never agree to go into court on behalf of a specific company.

(Nov. 15-16, 2001, ICHEIC meeting minutes, Weiss Plaintiffs' Surreply in Opp'n to Generali's Motion to Dismiss Ex. 3, at 4) Ambassador James Bindenagel, the State Department's Special Envoy for Holocaust Issues,

confirmed Chairman Eagleburger's view, according to the minutes:

> Mr. Bindenagle [*sic*] said the issue is whether the U.S. government would intervene between insurance companies and victims. There is no role for the U.S. government, and there is therefore no place for them to intervene in the way they are intervening in the German Foundation agreement.

(*Id.*) (*See also* Jan. 16-17, 2001, ICHEIC meeting minutes, Weiss Plaintiffs' Surreply in Opp'n to Generali's Motion to Dismiss Ex. 4, at 2 (recording commission member's comment that "[t]he U.S. Government could not be expected to intervene in the U.S. courts on behalf of Generali, since there was no governmental connection")) In short, the lack of a predicate "governmental connection" appears to explain the Government's decision not to file a statement of interest in the instant lawsuits, not its indifference to whether claims against Generali in particular are handled in the courts. The repeated Executive Branch pronouncements that ICHEIC should be the exclusive remedy for all Holocaust-era claims, discussed above, supports this conclusion. Accordingly, the Government's decision not to file a statement of interest, or otherwise intervene, in this litigation cannot be construed to indicate support for this court's adjudication of plaintiffs' claims.

Plaintiffs' contend as well that ICHEIC's own rules and procedures permit ICHEIC claimants simultaneously to litigate their claims in U.S. courts. (Weiss Plaintiffs' Surreply in Opp'n to **Generali's** Second Motion to Dismiss, at 9-11; Surreply of Plaintiffs Lantos et al., at 4) However, the relevant inquiry for the purpose of determining whether the laws supporting plaintiffs' claims are preempted is not what ICHEIC's rules permit, but rather what the executive policy is regarding disposition of Holocaust-era insurance claims. Even assuming that ICHEIC's rules grant plaintiffs the simultaneous right to obtain relief in the courts, the policy favoring ICHEIC resolution of Holocaust-era insurance claims requires dismissal of their claims for the reasons discussed above.

Plaintiffs remaining objections were expressly considered and rejected in *Garamendi*, and therefore receive only brief consideration here. They argue that their state law causes of action cannot be preempted because Congress expressly delegated to the States the authority to regulate insurance through the McCarron-Ferguson Act, 59 Stat. 33, ch. 20, 15 U.S.C. §§ 1011-1015. (Plaintiffs' Joint Opp'n to Generali's Motion to Dismiss, at 76) The Court held that that Act cannot be read to condone state laws interfering with federal efforts to resolve Holocaust-era insurance claims. *See Garamendi*,\fs20fs20 123 S.Ct. at 2394. Finally, plaintiffs argue that dismissal of their claims is improper because ICHEIC continues to be an inadequate forum for addressing their claims. (Weiss Plaintiffs' Surreply in Opp'n to Generali's Second Motion to Dismiss, at 11-

18) However, the Court ruled that concerns about the adequacy of ICHEIC are irrelevant to the preemption analysis. *See* 123 S.Ct. at 2393 ("[O]ur thoughts on the efficacy of one approach versus another are beside the point, since our business is not to judge the wisdom of the National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress.").[10]

III.

In addition to plaintiffs' core claims predicated on Generali's non-payment of policy benefits, they assert numerous claims alleging other instances of Generali's misconduct-for example, that Generali acted in "bad faith" by "recklessly or intentionally destroy[ing] evidence of the Insurance Policies . . . or fail[ed] to maintain duplicates in a safe location" (*Schenker* Compl. ¶ 72(d)); breached its duty of good faith and fair dealing by "[u]nreasonably asserting a 'nationalization' defense that was misleading, false, and untrue, in claiming that

10. In *Generali* I, I discussed at length the shortcomings of ICHEIC as a venue for processing Holocaust-era insurance claims. *See* 228 F.Supp.2d at 356-58. However, the context of that discussion was Generali's motion to dismiss on *forum non conveniens* grounds. As I explained there, a court considering such a motion must, as one step in its analysis, consider whether a defendant's proposed alternative forum-here, ICHEIC-is an adequate one. *See id.* at 350 (citing *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 (2d Cir.2001)). Nothing in *Garamendi* calls into question the prevailing methodology in the Second Circuit for resolving a *forum non conveniens* motion.

it was not responsible for the Policies because the government had nationalized and expropriated its business in 1945" (*Lightner* Compl. ¶ 27(a)); and engaged in unfair competition by "[u]nfairly, unlawfully, and fraudulently misrepresenting to the General Public, including numerous California residents, that 'very little information and few records regarding policies' exist, when, in fact, [Generali] maintains tens of thousands of these policies in its Trieste, Italy warehouse" (*Szekeres* Compl. ¶ 47(d)). These claims, however, were not brought in a vacuum; they appear to have been made primarily as support for plaintiffs' benefits claims discussed above. In any event, plaintiffs cannot recover independently on any of these claims because they do not appear to allege any cognizable injury other than that caused by Generali's non-payment of benefits, for which redress is available only through ICHEIC for the reasons discussed above. Should ICHEIC determine that a plaintiff is entitled to the policy benefits he seeks, that plaintiff will have no further cause for complaint. On the other hand, should ICHEIC determine that a plaintiff entitled to no award, or to a smaller award than he seeks, the remaining claims, examples of which are described above, are not independently actionable. Accordingly, plaintiffs' ancillary claims must also be dismissed.

* * * * * *

For the reasons stated above, **Generali**'s motion to dismiss is granted as to all actions.

SO ORDERED:

Appendix B

APPENDIX

PLAINTIFFS' CLAIMS AGAINST GENERALI

Named Plaintiff	*Claims*
Cornell (class action)	International law (¶¶ 48-51) Breach of insurance policies (52-58) Breach of fiduciary duties (59-64) Breach of duty to disclose (65-67) Conversion (68-70) Bad faith (71-73) Unjust enrichment (74-76) Unfair business practices under N.Y. General Business Law (77-92) Constructive Trust (93-96) Accounting (97-99)
Schenker (class action)	International law (63-66) Conversion (67-69) Unjust enrichment (70-71) Breach of insurance policies (72-78) Breach of fiduciary duty (79-83) Breach of special duty (84-86) Breach of duty to disclose

	(87-88) Bad faith (89-90) Conspiracy (91-93) Accounting (94-95) Unfair business practices under N.Y. General Business Law (96-112) Constructive Trust (113-115)
David	Breach of Insurance Policies (1-23) Bad Faith (24-25) Unjust Enrichment (26-31)
Lightner	Breach of duty of good faith and fair dealing (26-34) Breach of contract (35-38) Unfair business practices under Cal. Bus. & Prof.Code §§ 17200 and 17500 (39-47)
Szekeres	Breach of duty of good faith and fair dealing (33-41) Breach of contract (42-45) Unfair business practices under Cal. Bus. & Prof.Code §§ 17200 and 17500 (46-54)

Appendix B

Smetana (class action)	Breach of contract (78-83) Breach of duty of good faith and fair dealing (84-90) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (91-103) Constructive Trust (104-109) Accounting (110-114)
Mandil	Breach of duty of good faith and fair dealing (23-31) Breach of contract (32-35) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500
Brauns	Breach of duty of good faith and fair dealing (31-39) Breach of contract (40-43) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500)
Sladek	Breach of duty of good faith and fair dealing (41-48) Breach of contract (49-52) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (53-61) Unjust enrichment (62-67)

Appendix B

Weiss	Breach of contract (113-122) Holocaust Victims Insurance Act, Fl. stat. § 626.9543 (123-134) Re-establish papers pursuant to Fl. stat. § 71.011 (135-142) Intentional spoliation of evidence (143-145) Conversion (146-148) Unjust enrichment (149-151) Breach of fiduciary duty (152-155) Constructive trust (156-160) Breach of special duty (161-163) Conspiracy (164-166) Accounting (167-168) Declaratory judgment pursuant to Fl. Statutes, chap. 86 (169-173)
Tabaksman	Breach of contract (30-37) International law (38-42) Breach of fiduciary obligations (43-49) Breach of duty to disclose (50-53) Conversion (54-56) Bad faith (57-60) Unjust enrichment (61-63) Constructive trust (64-68) Accounting (69-71)

Appendix B

Haberfeld (class action)	Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 Cal. Admin. Code, Title 10, § 2695.4(a) & (e)(1) Cal. Admin. Code, Title 10, § 2695.7(g)
Lantos	Breach of duty of good faith and fair dealing (25-32) Breach of contract (33-36) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (37-45) Unjust enrichment (46-51)
More	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)
Pioro	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)

Appendix B

Sorter	Breach of duty of good faith and fair dealing (27-34) Breach of contract (35-38) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (39-47) Unjust enrichment (48-53)
Ungar	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)
Weiss/Friedman	Breach of duty of good faith and fair dealing (19-26) Breach of contract (27-30) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (31-39) Unjust enrichment (40-45)
Zada	Breach of duty of good faith and fair dealing (16-23) Breach of contract (24-27) Unfair business practices under Cal. Bus. & Prof. Code §§ 17200 and 17500 (28-36) Unjust enrichment (37-42)

Appendix B

Anderman (class action)	Violations of Customary International Law (403-410) Imposition of a Constructive Trust (418-429) Unjust Enrichment (435-439) Conversion (440-443) Liability for Violations of International Law Under the Alien Tort Claims Act (444-455) Breach of Contract (456-461) California Holocaust Victim Insurance Relief Act of 1999 (462-474) Accounting (475-480) Disgorgement of Profits Pursuant to Cal. Business Code § 17200 *et seq.* (481-483)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 12, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of April, two thousand and ten.

Docket No. 05-5612-cv

In re ASSICURAZIONI GENERALI, S.P.A.

Dr. Thomas Weiss, Erna Birnbaum Gottesman and Martha Birnbaum Younger,

Plaintiff Appellants,

v.

Assicurazioni Generali, S.p.A.,

Defendant-Appellee.

Edward David, as Personal Representative of the Estate of David David,

Plaintiff Appellant,

Appendix C

v.

Assicurazioni Generali, S.p.A.,

Defendant-Appellee.

Dr. Thomas Weiss, Erna Birnbaum Gottesman and Martha Birnbaum Younger having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

s/ Catherine O'Hagan Wolfe

APPENDIX D — U.S. LETTER BRIEF DATED OCTOBER 30, 2008

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W.,
Rm: 7250
Washington, D.C. 20530
Tel: (202) 353-2689
Fax: (202) 514-9405

October 30, 2008

Via Federal Express

Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *In re Assicurazioni Generali*, Nos. 05-5602, et al.

Dear Ms. O'Hagan:

The United States of America respectfully submits this letter brief in response to the Court's August 1, 2008 letter to Secretary of State Condoleezza Rice. In its letter, the Court requested the Government's views on whether adjudication of the claims in *In re Assicurazioni Generali*, Nos. 05-5602, et al., "would conflict with the foreign policy of the United States."

Appendix D

It has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the exclusive forum and remedy for claims within its purview. The fact that ICHEIC has now concluded its operations does not alter the foreign policy of the United States. Claims against defendant Assicurazioni Generali ("Generali"), one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address.

The United States takes no position on whether plaintiffs' claims are preempted by its foreign policy in light *of American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), which, as the Supreme Court held in *Garamendi*, impermissibly impede the conduct of foreign policy and are thus preempted.

I. The Foreign Policy of the United States Has Been That ICHEIC Should Be Regarded As the Exclusive Forum and Remedy For Claims Within Its Purview.

A. The ICHEIC Process.

The United States Government has long been involved in efforts to resolve claims arising out of Nazi-era harms, and obtaining reparations for these harms

was a principal object of post-war Allied diplomacy. *See generally Garamendi*, 539 U.S. at 401-408. Although restitution laws enacted by the West German Government provided compensation to many victims, they also left out many claimants and certain types of claims.

In 1998, a number of insurance companies jointly agreed with U.S. state insurance regulators and Jewish and Holocaust survivor organizations to create ICHEIC. Their aim was to establish "a just process . . . that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust." Velie Dec., Exh. A ¶ 1, *In re Assicurazioni Generali*, No. MDL 1374 (M21-89) (S.D.N.Y. filed May 25, 2001).

Generali was one of ICHEIC's founding members and participated actively in its operations throughout the life of the organization. The company contributed $100 million to ICHEIC's overall settlement amount and also made its records available to ICHEIC, enabling researchers to match claimants to Generali policies even when the claimants were unaware or unsure that they were beneficiaries of a Generali policy.[1]

---

1. In the ICHEIC process as a whole, ICHEIC participating companies made 7,747 monetary offers to claimants who did not initially know the name of the insurance company that had issued their policy. Lawrence S. Eagleburger & M. Diane Koken *with* Catherine Lillie, Int'l Comm'n on Holocaust Era Ins. Claims, *Finding Claimants and Paying Them: The Creation and Workings of the International*

(Cont'd)

Appendix D

From ICHEIC's inception, the United States has participated in the organization as an observer and has sought to support its efforts. In dealing with Holocaust-era claims, the United States has followed a policy of supporting non-adversarial mechanisms of resolving such claims as opposed to litigation. Such mechanisms, the United States believes, provide benefits to more victims, and do so faster and with less uncertainty, than does litigation. Non-adversarial mechanisms thus facilitate the two primary goals of U.S. policy in this area—justice and urgency.

Consistent with this policy, the United States has publicly recognized the importance of Generali and other companies' voluntary participation in ICHEIC. As Stuart Eizenstat[2] explained in congressional testimony in 2000, the Executive Branch

> commend[s] the five European insurance companies that have joined [ICHEIC] and strongly encourage[s] all insurers that issued

---

(Cont'd)

Commission on Holocaust Era Insurance Claims 49 (2007), *available at* http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf. By way of comparison, the ICHEIC companies made offers on 5,448 claims in which the claimant knew the name of the insurer. *Id.*

2. As the Under Secretary of State and later Deputy Treasury Secretary and Special Representative of the President and Secretary of State on Holocaust Issues, Eizenstat was the chief American negotiator on Holocaust issues.

> policies during the Holocaust era * * * to join [ICHEIC] and participate fully in its program * * * *
>
> This is the best and most expeditious vehicle for resolving insurance claims from this period. And we support giving those companies who do join ICHEIC and cooperate with it, safe haven from sanctions, subpoenas and hearings in the United States relative to the Holocaust period.

The Legacies of the Holocaust, Hearing Before the S. Comm. on Foreign Relations, 106th Cong. 16 (2000) [hereinafter Eizenstat Senate Testimony].

B. The Executive Agreements.

While ICHEIC was being created and beginning its work, the United States was involved in facilitating complicated negotiations among European governments and companies, survivor groups, and claimants' representatives. Those negotiations were conducted against the backdrop of numerous class-action lawsuits filed in United States courts following German reunification.

The negotiations resulted in the signing of an executive agreement with Germany, and a joint statement by all the participants in the negotiations, that recognized the establishment of a German foundation funded with 10 billion DM. *Garamendi,* 539

U.S. at 405. The German government and German companies contributed to a fund that would be used to make payments to individuals who had suffered at the hands of German companies during the Nazi era, including those with unpaid insurance policies. *Id.* at 406-07; *see also* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298 (2000) [hereinafter German Foundation Agreement]. Germany also agreed that, insofar as insurance claims were concerned, the Foundation would process claims according to ICHEIC procedures. German Foundation Agreement, 39 I.L.M. at 1299; *see also Garamendi*, 539 U.S. at 406-07.

The United States committed in the Foundation Agreement to file a statement of interest in cases in which Holocaust-era claims against German companies were pending in U.S. courts, declaring that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy" for the resolution of all claims brought "against German companies arising from their involvement in the National Socialist era and World War II." German Foundation Agreement, 39 I.L.M. at 1303; *see also Garamendi*, 539 U.S. at 406. The Foundation Agreement noted that plaintiffs in pending suits "face[d] numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs." 39 I.L.M. at 1304. The Agreement and statements of interest filed by the

United States in conformity with that Agreement stated that they did not take a position on the legal contentions of the parties on those issues. *Id.* The Agreement further stated that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal," but it also stated that United States policy interests "favor dismissal on any valid legal ground." *Id.*

Shortly after entering into its agreement with the German government, the United States entered into two similar agreements with Austria. *See* Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 [hereinafter Austrian Fund Agreement]; Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund Reconciliation, Peace and Cooperation," U.S.-Austria, Jan. 23, 2001, 2001 WL 935261. Like the German agreement, the Austrian agreements allocated funds to cover (among other things) insurance claims against Austrian insurance companies, providing that such claims would be handled through Austrian entities that would largely follow ICHEIC procedures. Additionally, the United States pledged that if an Austrian insurance company were sued in U.S. courts over its Holocaust-era policies, the United States would file a statement of interest recommending that the suit be dismissed on any valid legal ground but also stating that the United States did

not suggest that its foreign policy interests concerning the Austrian agreements in themselves provide an independent legal ground for dismissal. Austrian Fund Agreement, 40 I.L.M. at 525, 528-29. The United States also concluded an agreement with France (though the agreement did not address insurance claims). The United States did not conclude any agreement with Italy.

C. The *Garamendi* Decision.

In *Garamendi*, the Supreme Court considered a constitutional challenge to a provision of California law that required each insurance company doing business in the State to publicly disclose detailed information concerning Nazi-era European policies issued by the company or its affiliates. The United States, as amicus curiae, urged the Court to invalidate the California statute.[3] The Supreme Court held that the statute

---

3. The United States noted that the Supreme Court "has struck down state laws that engaged a State in matters affecting the Nation's external affairs 'even in [the] absence of a treaty' or an Act of Congress as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause." Brief for the United States as Amicus Curiae Supporting Petitioners at 12, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (No. 02-722) [hereinafter U.S. *Garamendi* Br.] (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)). The United States thus urged that HVIRA was unconstitutional as an "intru[sion] into the field of foreign relations," as underscored by "[t]he conflict between (Cont'd)

impermissibly intruded into the conduct of U.S. foreign policy. The Court pointed to the history of negotiations over the German Foundation Agreement and Austrian Fund Agreement as evidence of a "consistent Presidential foreign policy * * * to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 539 U.S. at 421. "As for insurance claims in particular," the Court continued, "the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* The Court held that the disclosure provisions of California law were preempted by federal law because they "interfere[] with the foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France." *Id.* at 413.

The Court explained that the executive agreements were not themselves preemptive; instead, the state statute was preempted because it conflicted with the

---

(Cont'd)

the means chosen by the United States and by California to resolve Holocaust victims' insurance claims" in particular. *Id.* at 12-13. The United States further observed that HVIRA constituted "extraterritorial regulation" in violation of the Commerce Clause and Due Process Clause of the Fourteenth Amendment, both of which "prohibit a State from regulating activity outside its borders." *Id.* at 21.

federal foreign policy embodied and reflected in those agreements. *Id.* at 415-417, 420-22. Thus, the Court described the Austrian and German agreements as "exemplars" of the United States' foreign policy, but it also quoted and relied on various statements by executive branch officials, including statements by Deputy Treasury Secretary Stuart Eizenstat and others, setting out the position of the United States. These statements declared that ICHEIC "should be considered the exclusive remedy for resolving insurance claims from the World War II era" and that "a company's participation in the ICHEIC should give it a 'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period." *Id.* at 422 (internal quotation marks omitted) (quoting Eizenstat Senate Testimony at 23, and *Restitution of Holocaust Assets: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 173 (2000) (statement of Stuart Eizenstat)).

Consistent with the Supreme Court's explanation that U.S. foreign policy (and not any particular executive agreement) had preemptive force in *Garamendi*, the Supreme Court's decision in *Garamendi* made no distinctions between the insurance companies from Germany and Austria challenging the state statute, and Generali, which also was a petitioner in the *Garamendi* litigation, even though, as discussed, the United States had entered into executive agreements with Germany and Austria, but not with Italy. The brief of the United States as amicus curiae likewise drew no such distinctions among the petitioners. *See generally* U.S. *Garamendi Br.; see also id.* at 15 (stating that

application of the state statute to ICHEIC participants "undermines the United States' ability to persuade foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC"). And, as in *Garamendi*, the pertinent U.S. foreign policy interest is not diminished, for purposes of this case, by the absence of an executive agreement with Italy.

II. United States Foreign Policy Is Not Altered by the Conclusion of the ICHEIC Process.

That ICHEIC has now concluded its operations does not alter the foreign policy of the United States. It was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process. The policy, as noted, was to encourage all insurance claims to be brought before ICHEIC, thereby promoting not only expeditious and fair resolution of such claims, but also closure for European companies. The obligations of the executive agreements with Germany and Austria still apply, and, as State Department officials have noted, it would undermine future efforts to secure voluntary compensation agreements if ICHEIC participants became subject to litigation as soon as ICHEIC had concluded. *See The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the H. Comm. On Fin. Servs.*, 110th Cong. 11 (2008) (statement of Amb.

Appendix D

J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Dept. of State) (explaining that if ICHEIC participants are subjected to post-ICHEIC litigation, the result could discourage new countries from establishing compensation systems).

Although the ICHEIC process has concluded, the United States continues its efforts to obtain the cooperation of other nations in contributing to new programs that would potentially provide additional compensation to Holocaust survivors. Poland is on the verge of approving new compensation legislation, and the State Department has been working with Romania in the hopes of improving that country's existing program. Additionally, the United States is involved in ongoing discussions with several European governments in an effort to convene a second Holocaust assets conference. (The first such conference, which took place in 1998, helped to create momentum for the agreements concluded in the subsequent years.) This second conference is currently planned to take place in Prague in June 2009, and the United States is hopeful that it will be able to reach agreements with a number of countries from Central and Eastern Europe.[4]

4. In addition to the United States' efforts, the Conference on Jewish Material Claims Against Germany ("Claims Conference"), a key non governmental organization based in New York, has been involved in negotiating an expansion of German compensation programs. Some of these negotiations have been successful, and the results have inured to the benefit of many Americans. Other negotiations are still ongoing, and it is important to the United States that those efforts not be undermined.

For these reasons, to answer the Court's question, it is contrary to settled United States foreign policy for plaintiffs' claims to be adjudicated in the courts of the United States.[5] The United States takes no position, however, on the legal impact of that foreign policy on the Court's disposition of the claims, except with regard to those claims that arise under California's HVIRA or similar state statutes or state-law principles that single out claims involving events in a foreign country for special treatment. *See supra*, pp. 6-7 & n.3. As the Supreme Court held in *Garamendi*, California's HVIRA falls outside an area of traditional state competence, specifically and impermissibly intrudes into the sphere of foreign policy, impedes the accomplishment of national foreign policy objectives, and is thus preempted. *See* 539 U.S. at 418-420, 425-427. Florida's Holocaust Victims Insurance Act (HVIA) parallels the California statute in all material respects, imposing a variety of requirements with regard to Holocaust-era insurance

5. In his supplemental brief, plaintiff Edward David argues that his claim does not conflict with U.S. foreign policy, urging that Generali refused to honor his policy because it believed that the policy had been cancelled sometime before 1936. If the policy had lapsed by that date, David maintains, it could not have been successfully submitted to ICHEIC.

This view of the facts conflicts with the facts as stated in David's Complaint, *see* A-438, and the United States is not in a position to resolve this apparent factual dispute. However, when a lawsuit arises out of an insurance policy that was cancelled before the Holocaust Era (as that term is defined by ICHEIC), adjudication of the claim is not inconsistent with the United States' foreign policy.

policies on companies seeking to do business in Florida.[6] *See Garamendi*, 539 U.S. at 413 n.6 (noting the similarity between Florida's HVIA and California's HVIRA); *see also Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (holding, in accord with the views of the United States, that Florida's HVIA violated due process because the state had insufficient connections to the European insurance contracts and companies that it regulated).[7] Claims under such provisions are foreclosed under *Garamendi*.

III. Conclusion

For the foregoing reasons, it would be in the foreign policy interests of the United States that ICHEIC be regarded as the exclusive forum for resolution of

---

6. *See* Fla. Stat. § 626.9543(3)(a) (defining a "Holocaust victim" as "any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany"); *id.* § 626.9543(5) (imposing special claims handling requirements for insurance claims submitted by Holocaust victims or their beneficiaries); *id.* § 626.9543(6) (imposing special statutes of limitations for claims brought by Holocaust victims or their beneficiaries); *id.* § 626.9543(7) (imposing special disclosure requirements for policies issued to Holocaust victims).

7. The Brauns Complaint asserts claims under California's HVIRA. *See* Brauns Compl.¶ 45(q), A-248. Plaintiff Weiss asserts claims under Florida's HVIA. *See* Weiss Compl. ¶¶ 123-134, A-339 to A-341.

insurance claims against companies like Generali that participated in the ICHEIC process. Accordingly, it would be in the foreign policy interests of the United States that such claims not be pursued through the courts. Consistent with the statements of interest filed by the United States in cases covered by the German Foundation Agreement, the United States does not suggest that its foreign policy interests concerning these claims and ICHEIC in themselves furnish an independent basis for dismissal. Similarly, the United States takes no position on the various legal grounds that have been urged in favor of dismissal, except that it is the United States' view that plaintiffs may not rely on Holocaust-specific state statutes such as HVIRA (or state-law principles that similarly single out claims concerning events in a foreign country for special treatment). For the reasons given by the Supreme Court in *Garamendi* and by the United States in its brief in that case, such state law is preempted.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

MARK B. STERN
(202) 514-5089

/s/ Sharon Swingle
SHARON SWINGLE
(202) 353–2689

BENJAMIN M. SHULTZ
(202) 514-3518

Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
Washington, D.C. 20530-0001

JOHN B. BELLINGER, III
Legal Adviser
U.S. Department of State

APPENDIX E — SUPPLEMENTAL U.S. LETTER BRIEF DATED OCTOBER 27, 2009

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W.,
Rm. 7211
Washington, D.C. 20530
Tel: (202) 514-3518
Fax: (202) 514-9405

October 27, 2009

Via Federal Express
Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *In re Assicurazioni Generali S.P.A.*, Nos. 05-5612-cv, 05-5310-cv

Dear Ms. Wolfe:

The United States of America respectfully submits this supplemental letter brief in response to the Court's July 29, 2009 letter to Secretary of State Hillary Rodham Clinton. In its letter, the Court inquired whether the current administration adheres to the position expressed in the Government's October 30, 2008 letter brief.

Appendix E

A. The position of the United States continues to be that set out in our original letter brief. As we explained, "[i]t has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the *exclusive forum and remedy* for claims within its purview." United States's 10/30/08 Letter Br. at 1 (emphasis added). Holocaust-era insurance claims against the defendant, Assicurazioni Generali ("Generali"), fall within this category.

1. The United States has long believed that compensation for Holocaust-era injuries should be achieved through negotiation and cooperation with relevant parties. As the Supreme Court observed in *American Insurance Ass'n v. Garamendi*, there has been a "consistent Presidential foreign policy * * * to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." 539 U.S. 396, 421 (2003). Indeed, over many years, State Department negotiators have facilitated the resolution of class action lawsuits and helped parties reach agreements resulting in payments of over $8 billion to the victims of Nazi Germany. *The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 10 (2008) (statement of Amb. J. Christian Kennedy) [hereinafter Kennedy Testimony]. And with regard to "insurance claims in

particular, the national position has been to work with the ICHEIC." *Garamendi*, 539 U.S. at 421; *see also id.* at 422 (citing a statement from Stuart Eizenstat that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era" (quoting *Restitution of Holocaust Assets: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 173 (2000)) (alterations supplied by the Court)).[1]

The United States's policy in this area reflects a consistent commitment to working towards achieving "some measure of justice for Holocaust victims and their families," and to do so in their lifetimes, rather than seeing victims and their families subjected to the prolonged uncertainty and delay of protracted litigation. *The Legacies of the Holocaust, Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 19 (2000) (testimony of Stuart Eizenstat). Thus, the United States has negotiated agreements, and helped establish compensation mechanisms, in order to aid Holocaust victims and their families in "recovering property that was stolen from them, * * * enforcing their rights under insurance contracts that were abrogated," and receiving compensation "for personal injuries sustained and for

---

1. As Under Secretary of State and later Deputy Treasury Secretary and Special Representative of the President and Secretary of State on Holocaust Issues, Stuart Eizenstat was the chief American negotiator on Holocaust issues. Ambassador Eizenstat currently serves as Special Adviser to the Secretary of State for Holocaust Issues.

slave labor and forced labor performed under brutal conditions." *Id.*

The United States believes that its long-standing, and ongoing, pursuit of cooperative compensation arrangements best achieves justice for the greatest numbers of Holocaust victims, survivors, and heirs. In order to ensure that large numbers of potential claimants could learn about ICHEIC and the claims process, for example, ICHEIC published advertisements in numerous newspapers, engaged in a global media campaign, posted lists of known and potential policyholders and other information on its website, and worked with Jewish organizations around the world. *See* Lawrence S. Eagleburger & M. Diane Koken *with* Catherine Lillie, Int'l Comm'n on Holocaust Era Ins. Claims, *Finding Claimants and Paying Them: The Creation and Workings of the International Commission on Holocaust Era Insurance Claims* 21-22, 37-38 (2007), *available at* http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf. Moreover, we believe that non-adversarial mechanisms such as ICHEIC provide the most effective way of ensuring compensation for the many victims who might be unable to meet evidentiary standards required by courts.

2. The Government's efforts to encourage ICHEIC are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, as well as to support broad "legal peace" for countries and companies subject to ongoing claims. That policy underlies the executive agreements

the United States entered into with Austria and Germany. But importantly, this foreign policy exists independent of those agreements, and is not cabined by them or limited by their explicit terms. As the Supreme Court observed in *Garamendi*, the Austrian and German agreements are "exemplars" of American national policy, 539 U.S. at 422; they do not define or limit the policy.

As an Italian corporation, Generali is not subject to the commitments of an executive agreement, as no such agreement was entered into with Italy.[2] However, the Government's strong foreign policy favoring negotiated and cooperative resolutions to Holocaust-era disputes

---

2. Because no executive agreement specifically applies to claims against Generali, the United States has no international legal obligation to file a statement of interest addressing such claims. *Cf.* Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523, 525, 528-29 (stating that the United States will file a Statement of Interest in Holocaust cases against Austrian companies sued in American courts); Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298, 1300, 1303-04 (2000) (stating that the United States will file a Statement of Interest in Holocaust cases against German companies sued in American courts). As discussed, however, the obligations contained in the executive agreements exemplify but do not define the foreign policy interests of the United States; for the reasons articulated in our filings, those foreign policy interests encompass claims against Generali.

applies broadly, and this policy has been instrumental in securing the cooperation of our key partners as we pursue a measure of justice for Holocaust victims. That policy successfully encouraged companies, including Generali, to participate in the ICHEIC process. And as Ambassador J. Christian Kennedy [3] has explained, if suits against ICHEIC participants continue, the result could be to "undermine the many positive working relationships we have built over the years," and to discourage other companies and countries from voluntarily pursuing restitution programs. Kennedy Testimony at 11.

Moreover, Generali was an early and active participant in ICHEIC, and along with the other ICHEIC companies it has agreed to continue processing claims in accordance with the relaxed standards of proof developed at ICHEIC. Thus, although ICHEIC has ceased operations, anyone who believes an ICHEIC insurance company has failed to pay a claim may send his application to that company or to the Holocaust Claims Processing Office of the New York State Banking Commission. Stuart E. Eizenstat, *Opening Plenary Session Remarks At Prague Holocaust Era Assets Conference* (June 28, 2009), *available at* http://www.state.gov/p/eur/rls/rm/2009/126158.htm. The United States continues to encourage this ongoing cooperation by all ICHEIC participants, not simply by

---

3. Ambassador Kennedy served as Special Envoy for Holocaust Issues during the prior administration, and continues to serve in that capacity during the current administration.

those whose activities happen to be covered by specific executive agreements.

In addition, the United States continues to be active in calling on countries to take new concrete measures to assist Holocaust survivors. At the Prague Holocaust Era Assets Conference in June 2009, for example, the United States asked attendees to increase their restitution efforts on a number of fronts, including for stolen art and immovable property. *See id.* In response, the Czech government pledged to establish an institute that (among other things) will work to develop standards to govern voluntary compensation programs in some of these areas. *See* Terezin Declaration, June 30, 2009, http://www.state.gov/p/eur/rls/or/126162.htm.

Further litigation against ICHEIC participants would foment adversarial relationships between claimants and insurance companies and potentially interfere with efforts to ensure the continued processing of insurance claims using relaxed standards of proof. Such litigation may also impede efforts to secure further voluntary compensation for Holocaust victims and their families under such mechanisms as are contemplated under the Terezin Declaration. Accordingly, adjudication of this suit would be contrary to United States foreign policy interests.

B. The purpose of this filing, like that of the U.S. government filings made pursuant to the executive agreements, is not to urge a particular legal ground for dismissal but to inform the Court of the strong foreign

policy favoring negotiated and cooperative resolution of Holocaust-era disputes. Thus, as in our prior brief, the United States in general takes no position as to the legal impact of its foreign policy concerns on the disposition of plaintiffs' claims. The one exception consists of claims under Holocaust-specific state laws and principles like the California Holocaust Victims Insurance Relief Act (HVIRA); as we explained in our prior brief, such claims fall squarely within the Supreme Court's holding in *Garamendi* and are therefore legally precluded. *See* United States's 10/30/08 Letter Br. at 10.

Plaintiff Weiss mistakenly urges that this position is inconsistent with that asserted in the U.S. Government's 2000 brief in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). *See* 1/8/09 Second Notice of Supp. Auth. at 1-3. In the *Gerling* brief, the Government stated that the German Foundation Agreement "itself" did not preclude individuals from filing suit, and we also stated that the Agreement did not "by its terms" preempt California's HVIRA. 1/8/09 Second Notice of Supp. Auth. Exh. at 8-9. Further, we observed the existence of language in the Agreement declaring that "'the United States does not suggest that its policy interests concerning the Foundation [discussed in the Agreement] in themselves provide an independent legal basis for dismissal'" of claims in U.S. courts. *Id.* at 6 (quoting from the Foundation Agreement); *see also id.* at 9.

Those statements and observations were correct, and are entirely consistent with our October 2008 letter

brief. The Government's *Gerling* brief explained that even though the Foundation Agreement itself did not preempt the California statute, enforcing HVIRA would be contrary to national foreign policy and should be precluded as interfering with the federal government's ability to speak with one voice in the conduct of foreign affairs. *See id.* at 22-27. As was the case then, the Government's foreign policy interests are not today limited to the terms, or even to the existence, of particular agreements. Indeed, the agreements with Germany and Austria were part of an effort to accomplish broader foreign policy goals, which we have described above. The Supreme Court ultimately determined that the challenged provisions of the California statute conflicted with U.S. foreign policy and could not constitutionally be enforced. *See Garamendi*, 539 U.S. at 401, 413-420. That holding is, of course, binding here.

* * *

In our prior letter brief, and again in this brief, we have explained that it is in the foreign policy interests of the United States for ICHEIC to be the exclusive forum for the resolution of claims within its purview. These interests exist independent of the specific executive agreements that are "exemplars" of United States policy, and the interests apply with full force to the claims at issue here, which are not covered by an executive agreement. The United States takes no position on the legal impact of its foreign policy on the Court's disposition of the claims before it, except to the

extent that plaintiffs' claims rely on statutes or state law principles similar to those that *Garamendi* held unenforceable. In sum, the position stated in the Government's October 2008 letter brief continues to be the position of the United States.

Respectfully submitted,

TONY WEST
Assistant Attorney General

PREET BHARARA
United States Attorney

DAVID S. JONES
Assistant United States Attorney

MARK B. STERN
(202) 514-5089

SHARON SWINGLE
(202) 353–2689

/s/ Benjamin M. Shultz
BENJAMIN M. SHULTZ
(202) 514-3518

Attorneys, Appellate Staff Civil Division, Room 7211
Department of Justice
Washington, D.C. 20530-0001

HAROLD HONGJU KOH
Legal Adviser
U.S. Department of State

169

No. 10-80

Supreme Court, U.S.
FILED
AUG 20 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,

DR. THOMAS WEISS,
Petitioner,

v.

ASSICURAZIONI GENERALI, S.P.A., AND BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MARCO E. SCHNABL
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

PETER SIMSHAUSER
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, MA 02108
(617) 573-4800
Peter.Simshauser
@skadden.com

Attorneys for Respondents

QUESTION PRESENTED

After more than a decade of litigation, Petitioner is the only claimant attempting to pursue a Holocaust-era insurance claim in any United States court. He has rejected Respondent's payment offer on his father's 1936 Czechoslovakian insurance policy under the standards of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), endorsed by the Executive Branch as the exclusive means for resolving Petitioner's claim, as this Court recognized in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003). After *Garamendi*, Generali has paid more than $100 million through ICHEIC to thousands of claimants. In reliance on this Executive Branch policy and on *Garamendi*, the Second Circuit affirmed the dismissal of Petitioner's lawsuit, after having twice sought and received written confirmation from both the Bush and Obama Administrations that this policy, which originated in the Clinton Administration, remained applicable to Petitioner's lawsuit.

This case thus raises the following question:

Whether the Second Circuit's ruling, which simply applied *Garamendi* and lacks meaningful practical ramifications beyond Petitioner's single case, merits certiorari review.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Respondent Assicurazioni Generali S.p.A. ("Generali") is an Italian corporation. It has no parent corporation and the only publicly held corporation that owns 10% or more of Generali's stock is Mediobanca, S.p.A., another Italian corporation.

Respondent Business Men's Assurance Company of America ("BMA") was a wholly-owned subsidiary of Generali from August 1990 until June 2003. On July 1, 2003, BMA became a wholly-owned subsidiary of Royal Bank of Canada, a Canadian corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 12

A. The President's Extensive War-Related Powers Preclude Petitioner's Complaint 14

1. The President Is Empowered To Resolve Petitioner's Claim 14

2. None Of The Decisions That Petitioner Cites Calls *Garamendi* Into Question 16

3. *Amici* Misapprehend The President's Claims-Settlement Power 18

B. The Absence Of An Executive Agreement Between The United States And Italy Is Immaterial 22

Contents

Page

1. *Garamendi* Is Based On Conflict With Presidential Foreign Policy, Not Executive Agreements 22

2. Neither Lower Court Applications Of *Garamendi* Nor The Court's *Medellin* Decision Provides A Basis For Review 26

C. The Remedy Chosen By The President Remains Available To Petitioner 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

In re Agent Orange Product Liability Litigation,
373 F. Supp. 2d 7 (E.D.N.Y. 2005) 18

Altria Group, Inc. v. Good,
129 S. Ct. 538 (2008) 16

American Insurance Ass'n v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

In re Assicurazioni Generali S.p.A.,
592 F.3d 113 (2d Cir. 2010) 11, 12, 25, 26

In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation,
340 F. Supp. 2d 494 (S.D.N.Y. 2004) 5, 6, 7

Claim of Bernard Dworetzky against Poland,
Claim No. PO-2320, Decision No. PO-3705 (F.C.S.C. 1964) 4

Claim of Frederick Bedrich Brunner against Czechoslovakia,
Claim No. CZ-1698, Decision No. CZ-635 (F.C.S.C. 1960) 4

Crosby v. National Foreign Trade Council,
530 U.S. 362 (2000) 24

Cited Authorities

Page

Cruz v. United States,
387 F. Supp. 2d 1057 (N.D. Cal. 2005) 17, 18

Dames & Moore v. Regan,
453 U.S. 654 (1981) 22, 28, 29

Ibrahim v. Titan Corp.,
391 F. Supp. 2d 10 (D.D.C. 2005) 27

Haig v. Agee,
453 U.S. 280 (1981) 19

In re Holocaust Victim Assets Litigation,
311 F. Supp. 2d 363 (E.D.N.Y. 2004),
aff'd, 424 F.3d 150 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006) 1

In re Holocaust Victim Assets Litigation,
424 F.3d 132 (2d Cir. 2005)..... 8

In re Nazi Era Cases Against German Defendants Litigation,
129 F. Supp. 2d 370 (D.N.J. 2001)..... 5

Medellin v. Texas,
552 U.S. 491 (2008) 19, 27, 28

Movsesian v. Versicherung,
578 F.3d 1052 (9th Cir. 2008) 23

Cited Authorities

Page

Rubin v. Assicurazioni Generali S.p.A.,
290 Fed. Appx. 376 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1347 (2009) (No. 08-780) 8

Schydlower v. Pan American Life Insurance Co., 231 F.R.D. 493 (W.D. Tex. 2005) 18

Silkwood v. Kerr-McGee,
464 U.S. 238 (1984) 16

United States v. Belmont,
301 U.S. 324 (1937) 15

United States v. Pink,
315 U.S. 203 (1942) 15

Whiteman v. Dorotheum GmbH & Co KG,
431 F.3d 57 (2d Cir. 2005) 26

Wyeth v. Levine,
129 S. Ct. 1187 (2009) 16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 19

Zschernig v. Miller,
389 U.S. 429 (1968) 24

Statutes

22 U.S.C. §§ 1642-1642(p) 4

Cited Authorities

Page

28 U.S.C. § 517 9

H.R. 1746, 110th Cong., 1st Sess. (2008) 20

H.R. 4596, 111th Cong., 2nd Sess. (2010) 20

Other Authorities

Sup. Ct. R. 10 3

Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004) 20

David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963 (2003) 20, 21

Edward D. Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 Mich. L. Rev. 1079 (1962)..... 4

Finding Claimants and Paying Them: The Creation and Workings of the International Commission on Holocaust Era Insurance Claims (2007), *available at* http:www.icheic.org/pdf/icheic%20Legacy%20Document.pdf 11

Cited Authorities

Page

The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the House Committee on Financial Services, 110th Cong. 108 (2008) (statement of Stuart E. Eizenstat, Former Special Representative, President & Secretary of State on Holocaust Era-Issues) 5, 6

Louis Henken, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 15

Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133 (1998) 20

INTRODUCTION

Petitioner is the only plaintiff in any United States court pursuing a claim against a European insurer on a Holocaust-era insurance policy.[1] All earlier cases against Generali have been settled and dismissed, and a class action settlement bars the institution of future cases by all but a small number of opt-outs.

Petitioner's case concerns a 1936 Czech insurance policy issued in local currency worth some $165 at pre-war exchange rates and valued at approximately $5,800 under ICHEIC's claimant-friendly methodology. Petitioner has eschewed ICHEIC and the equivalent programs that remain in effect today, which thousands of others have accepted. He instead has inveighed before courts, Congress, and the Executive against ICHEIC and the Executive policy upheld in *Garamendi*. He has opposed any consensual resolution of Holocaust-related claims, in the interest of self-enrichment. In 2004, in an earlier Holocaust-related case, the district court stated that Petitioner had "attempted to extort a significant cash award from a fund belonging to Holocaust survivors . . . ."[2]

The Second Circuit's unanimous decision affirming the dismissal of Petitioner's complaint was

---

[1] The Petition's references to "plaintiffs" in the plural are mistaken.

[2] *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 375 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 150 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006).

a routine application of *Garamendi*, where Generali was a Plaintiff-Petitioner and the Court held that:

> (1) "[R]esolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs." 539 U.S. at 420;
>
> (2) The Executive policy was that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." *Id.* at 422 (quotation omitted; alterations original);
>
> (3) The Executive policy existed independently of any Executive Agreements with European governments. *Id.* at 416-17 (stating that "[petitioners] leave their claim of preemption to rest on asserted interference with the foreign policy those agreements embody") (citations and footnote omitted); and
>
> (4) State legislation to promote litigation of Holocaust-era insurance claims was preempted because it conflicted with the Executive policy. *Id.* at 425 ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.").

Prior to the Second Circuit's ruling, the Bush and Obama Administrations both confirmed, at the court's request, (1) that the Executive policy that had originated in the Clinton Administration remained in force, and (2) that this policy embraced claims

against Generali despite the absence of an Executive Agreement with Italy.

This case does not present an issue of federal law with significant practical or legal consequences. Nor does it present any split between Circuit Courts, any conflict with another decision of this Court, or any departure from the accepted and usual course of judicial proceedings. Petitioner disagrees with the Second Circuit's application of *Garamendi*, but that is not a basis for certiorari review. *See* Sup. Ct. R. 10.

The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Background

Over the past decade, Petitioner has repeatedly accused Generali of cooperating with the Nazis during World War II. The historical record is clear, however, that both Generali's assets backing pre-war life insurance policies issued in Eastern European countries and the insureds' rights under such policies were nationalized by the communist governments that the Soviets installed at the conclusion of World War II. It is for that reason that the vast majority of Eastern European policies, such as the one on which the Petitioner based his claim,[3] went either unclaimed or unpaid, as the obligations

---

[3] Although Petitioner alleges he is the beneficiary under multiple pre-war Generali policies issued in Eastern Europe, exhaustive research, which was accepted by ICHEIC and independent auditors, has located only the 1936 Czech policy issued to Petitioner's father noted above.

were assumed by the communist governments. Indeed, these nationalizations were recognized by 1958 legislation empowering the U.S. Foreign Claims Settlement Commission ("FCSC") to compensate claimants for assets nationalized by these governments.[4] Several claims on expropriated Generali policies are discussed in FCSC awards.[5]

B. The Federal Government's Foreign Policy That ICHEIC Should Be The Exclusive Forum For Holocaust-Era Insurance Claims

In the wake of an explosion of Holocaust-related litigation against European defendants in the 1990s, the President developed policies that would resolve these matters for the benefit of claimants world-wide in the most expeditious, and economical manner.[6] In the insurance context, the national

---

[4] Title IV of the International Claims Settlement Act, 72 Stat. 527 1958, 22 U.S.C. §§ 1642-1642(p); *see generally*, Edward D. Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 Mich. L. Rev. 1079, 1086-87 (1962).

[5] *Claim of Frederick Bedrich Brunner against Czechoslovakia*, Claim No. CZ-1698, Decision No. CZ-635 (1960) (Generali policy issued in Czechoslovakia); *Claim of Bernard Dworetzky against Poland*, Claim No. PO-2320, Decision No. PO-3705 (1964) (Generali policy issued in Poland).

[6] *Garamendi*, 539 U.S. at 405 ("These suits generated much protest by the defendant companies and their governments, to the point that the Government of the United States took action to try to resolve 'the last great compensation related negotiation arising out of World War II.'") (citations omitted). This Court and lower federal courts have recognized that the issue of reparations for Holocaust victims and victims

(cont'd)

position that Holocaust-era claims be addressed exclusively through ICHEIC is beyond debate. As the Court stated in *Garamendi*, "[a]s for insurance claims in particular, the national position, expressed unmistakably . . . has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures." 539 U.S. at 421; *accord id.* at 422 (observing that deference to ICHEIC has "been consistently supported in the high levels of the Executive Branch"; quoting Secretary Eizenstat's statement in 2000 that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era"). [7] Executive Branch

---

(cont'd from previous page)
of Communist nationalizations in Eastern Europe has been a fixture of American foreign policy. *E.g., id.* at 403 (stating "[insurance policy] confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war," and discussing post-war reparations programs); *In re Nazi Era Cases Against German Defs. Litig.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001) (describing programs).

[7] *See also In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F. Supp. 2d 494, 504-05 (S.D.N.Y. 2004) (canvassing numerous other official statements to the same effect). Indeed, in 2008, Mr. Eizenstat testified to the House Financial Services Committee that Generali, which participated fully in ICHEIC despite not being within the ambit of any Executive Agreement, deserved exemption from lawsuits and from legislation designed to promote lawsuits:

> I am concerned . . . [about companies] that participated fully in the ICHEIC process without the benefit of an Executive Agreement calling for a Statement of Interest in the event of litigation.
>
> *(cont'd)*

representatives have stated this policy repeatedly in congressional hearings and other public venues, and Congress has never passed a bill to a contrary effect.

C. The District Court Dismisses Petitioner's Complaint Based On *Garamendi*

Petitioner filed his lawsuit in 2000, and it was one of twenty initially consolidated by the Judicial Panel on Multidistrict Litigation; all the others have since settled. The district court succinctly explained why *Garamendi* required dismissal:

> The Supreme Court's decision in *Garamendi* compels dismissal of plaintiffs' claims seeking damages for Generali's non-payment of policy benefits. . . . [T]he Court's decision requires dismissal also of

---

(cont'd from previous page)

> While there was no technical legal peace extended by the U.S. Government with respect to these companies, they nonetheless participated in good faith in a process that the United States Government had decided was the 'exclusive remedy' for resolving all Holocaust-era insurance claims. I testified before Congress on this very policy and it was broadly supported on a bipartisan basis. There is no justification for now subjecting them to some other remedy.

The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims, Hearing Before the House Committee on Financial Services, 110th Cong. 108 (2008) (statement of Stuart E. Eizenstat, Former Special Representative, President & Secretary of State on Holocaust Era-Issues

> the benefits claims arising under generally applicable state statutes and common law as well as customary international law. Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC. The salient fact for present purposes is that plaintiffs seek to obtain redress for Generali's non-payment of policy benefits by filing lawsuits in this country's courts; the legal justification for such claims is irrelevant.

340 F. Supp. 2d at 501 (citations and footnote omitted). The court rejected Petitioner's arguments that *Garamendi* did not extend to claims against Generali, *id.* at 503 ("Generali was one of the petitioners in *Garamendi* and the respondent, the California insurance commissioner, referred to Generali repeatedly in its briefs and at oral argument"), and that the Government's failure to submit a statement of interest or position in the district court undercut Generali's arguments. *Id.* at 506-07.

D. The Second Circuit Approves Generali's Class Settlement, And Certiorari Is Denied

After the district court's dismissal but prior to the Second Circuit's consideration of Petitioner's appeal from it, the class action plaintiffs in the consolidated proceedings entered into a settlement agreement with Generali. The class settlement was

affirmed over the objection of objectors represented by one of Petitioner's counsel (Mr. Dubbin), and this Court denied the ensuing certiorari petition. *Rubin v. Assicurazioni Generali S.p.A.*, 290 Fed. Appx. 376 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1347 (2009) (No. 08-780). The class settlement releases Generali from claims by any Holocaust victim, except a small number of persons (some 200) who opted out of the settlement, most of whom are citizens of foreign countries or have not even claimed that they or their families ever purchased a Generali policy.

Petitioner's counsel Mr. Dubbin also unsuccessfully opposed the settlement of Holocaust-era claims against Swiss banks. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005). In that matter, he was criticized by the district court for standing by while, as noted, Petitioner sought to "extort" funds from the settlement fund. *In re Holocaust Victim Assets Litig.*, *supra*.

E. At The Second Circuit's Request, Both The Bush And Obama Administrations Confirm That Foreign Policy Supports Dismissal Of Petitioner's Case

In October 2008, the Second Circuit inquired of Secretary of State Condoleezza Rice, "whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States." The Government responded directly and affirmatively that it would, and stated, inter alia:

- *"[T]o answer the Court's question, it is contrary to settled United States foreign policy*

for plaintiffs' claims to be adjudicated in the courts of the United States." Pet. App. 68a (emphasis added).

- "It has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the exclusive forum and remedy for claims within its purview." *Id.* at 57a.

- "The fact that ICHEIC has now concluded its operations does not alter the foreign policy of the United States." *Id.*

- "Claims against defendant Assicurazioni Generali ('Generali'), one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address." *Id.*

In October 2009, the Government responded to a second request from the Second Circuit, this time addressed to Secretary of State Hilary Rodham Clinton, asking whether the Obama Administration's position remained as stated in the Government's 2008 response.[8] The Government's response again was unequivocal, and confirmed that its foreign

---

[8] The Petition states that the "Department of Justice, not the State Department" responded to the Second Circuit's letters to Secretaries of State Rice and Clinton. Pet. At 5. DOJ acts as counsel for the United States, including the State Department, in all federal proceedings, *see* 28 U.S.C. § 517, and accordingly its participation on behalf of the State Department was entirely appropriate.

policy supports dismissal of Petitioner's lawsuit, in favor of voluntary payment that remains available. *See* Pet. App. 72a. The government's most recent response states:

- "The position of the United States continues to be that set out in our original letter brief. As we explained, '[i]t has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the *exclusive forum and remedy* for claims within its purview.' Holocaust-era insurance claims against the defendant, Assicurazioni Generali ('Generali'), fall within this category." *Id.* at 73a (emphasis original).

- "The Government's efforts to encourage ICHEIC are part of a larger policy to ensure the greatest compensation for the greatest number of Holocaust victims and their heirs, as well as to support broad 'legal peace' for countries and companies subject to ongoing claims. . . . *[I]mportantly, this foreign policy exists independent of [executive] agreements, and is not cabined by them or limited by their explicit terms.*" *Id.* at 75a-76a (emphasis added).

- "That policy successfully encouraged companies, including Generali, to participate in the ICHEIC process. And as Ambassador J. Christian Kennedy has explained, if suits against ICHEIC participants continue, the result could be to 'undermine the many positive working relationships we have built

over the years,' and to discourage other companies and countries from voluntarily pursuing restitution programs." *Id.* at 77a.

- "Generali was an early and active participant in ICHEIC, and along with the other ICHEIC companies it has agreed to continue processing claims in accordance with the relaxed standards of proof developed at ICHEIC. Thus, although ICHEIC has ceased operations, anyone who believes an ICHEIC insurance company has failed to pay a claim may send his application to that company or to the Holocaust Claims Processing Office of the New York State Banking Commission." *Id.*[9]

F. The Second Circuit Affirms The District Court Based On *Garamendi* And On The Government's Statements That Its Policy Supports Dismissal

Following *de novo* review, the Second Circuit affirmed the dismissal order as required *a fortiori* by *Garamendi*. *In re Assicurazioni Generali S.p.A.*, 592 F. 3d 113 (2d Cir. 2010) ("we hold under authority of *Garamendi* that Plaintiffs' claims, which fall within the scope of the ICHEIC process, are preempted by the foreign policy of the United States."):

---

[9] According to the ICHEIC report summarizing its work, "Through ICHEIC's efforts, a total of $306 million was offered to 48,000 Holocaust survivors and their heirs." *Finding Claimants and Paying Them: The Creation and Workings of the International Commission on Holocaust Era Insurance Claims* at 2 (2007), available at www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf.

> The cases before us . . . seek enforcement of the plaintiffs' claimed contract rights against Generali under state law. . . . [S]uch law suits are *directly* in conflict with the Government's policy that claims should be resolved exclusively through the ICHEIC. If, as the Supreme Court held in *Garamendi,* a state disclosure requirement conflicts sufficiently to be preempted by the national foreign policy of channeling Holocaust-era insurance claims through the ICHEIC, then, *a fortiori,* a state law suit to enforce a Holocaust-era insurance claim is preempted by that policy, as well.

Id. at 118.[10]

On April 12, 2010, the Second Circuit denied Petitioner's Petition for Panel Rehearing or Rehearing En Banc. *See* Pet. App. C. This Petition followed.

REASONS FOR DENYING THE PETITION

None of Petitioners' arguments merits review.

The Second Circuit's decision does not implicate anyone other than Petitioner. All other claimants who appealed the district court's decision have settled with Generali; to our knowledge there are no other Holocaust-related insurance cases

---

[10] The Second Circuit's opinion identifies three plaintiffs in addition to Petitioner. All three -- Erna Birnbaum Gottesman, Martha Birnbaum Younger and Edward David -- have settled their claims against Generali.

pending in U.S. courts, and there is no realistic prospect of any meaningful number of future claims. Petitioner, if he chose, could promptly avail himself of ongoing programs that immediately would pay him the ICHEIC value of his father's policy.

Nor does the Petition raise any substantive issues meriting review. There is no split of authority in the courts of appeal regarding application of *Garamendi*, and Petitioner does not so argue. Nor is there any dispute among the district courts, and the decisions cited by Petitioner do not support his argument that there is.

The grounds that Petitioner advances for granting the Petition all were fully addressed and rejected in *Garamendi,* as both the district court and Circuit already have explained. Likewise, the arguments advanced by *amici* in support of Petitioner are either policy preferences that clash with settled authority, or repetitions of arguments considered and rejected in *Garamendi.*

Petitioner simply is disappointed with the application to this case of the principles announced in *Garamendi.* But that is no basis for review.

A. The President's Extensive War-Related Powers Preclude Petitioner's Complaint

1. The President Is Empowered To Resolve Petitioner's Claim

In asking "Does *Garamendi* Preempt State Common Law Claims?", Pet. at 9, Petitioner poses the wrong question. His claims are preempted not by *Garamendi*, but rather by the Executive's long-established foreign policy, upheld in *Garamendi*, that all Holocaust-era insurance claims should be addressed by ICHEIC and similar voluntary programs, not through litigation. As the Court explained in *Garamendi*, the power to dispose of these specific claims is "well within" the President's responsibilities:

> To begin with, resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, there is a "longstanding practice" of the national Executive to settle them . . . .

539 U.S. at 420.

The Court also held that the "evidence of clear conflict" between "*the consistent Presidential foreign policy* . . . to encourage European governments and companies to volunteer settlement funds in

preference to litigation," and California's "different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors," preempted that state's disclosure statute. *Id.* at 421, 423 (emphasis added).

Petitioner ignores fundamental principles in suggesting that, in the arena of foreign relations in the aftermath of foreign wars, the Federal Government may not limit claims based on a State's common law. This Court has made clear on numerous occasions that "as regards U.S. foreign relations, the states 'do not exist.'" Louis Henken, *Foreign Affairs and the United States Constitution* 150 (2d ed. 1996) (quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937)). As Justice Douglas wrote in *United States v. Pink*, 315 U.S. 203, 233-34 (1942), on which *Garamendi* relied:

> No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

2. None Of The Decisions That Petitioner Cites Calls *Garamendi* Into Question

Petitioner points to the Court's decisions addressing the scope of federal statutory preemption of state law claims held by plaintiffs injured by cigarettes (*Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008)), medications (*Wyeth v. Levine*, 129 S. Ct. 1187 (2009)) and nuclear materials (*Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984)).[11] But all these involve circumstances -- personal injuries resulting from purely domestic activities -- in which states unquestionably have a role and the Court must determine whether Congress has the ability to displace state law, and if so, whether it intended to do so. No such analysis is warranted here, where extinguishment of claims in favor of an alternative resolution procedure, is based on the National Government's *complete* and *exclusive* primacy in the sphere of foreign affairs. The *Garamendi* Court made very plain that, unlike in the preemption cases cited by Petitioner, there is no state interest sufficient to overcome Executive primacy in this sphere:

> The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's

---

[11] Although both *Levine* and *Good* postdate *Garamendi*, neither even cites it, let alone purports to alter it.

> favor, given the weakness of the State's interest . . . . [T]here is no serious doubt that the state interest actually underlying HVIRA is concern for the several thousand Holocaust survivors said to be living in the State. . . . As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy.

539 U.S. at 425-27.

Moreover, the Second Circuit did not, as Petitioner argues, "expand[] on this Court's holding in *Garamendi*." Pet. at 8. Rather, as the Court stated, its holding was the *a fortiori* result of *Garamendi*. If anything, the circuit went to extremes in being solicitous of Petitioner's position, twice asking the State Department to confirm that the Government's foreign policy was in force and applies to the claims at issue.

Nor do any of the few district court decisions that Petitioner cites as conflicting with the Second Circuit, *see* Pet. at 10-11, actually do so, wholly aside from the fact that even if they did this would not warrant certiorari review. None of these cases addressed Holocaust-era claims of any nature, let alone Holocaust-era insurance claims. None of them held that the Executive's foreign policy could not displace state law claims. And, unlike here, in none did the Government's express and contemporaneous foreign policy disfavor litigation of the plaintiff's claim. For example, in *Cruz v. United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005), the court denied

motions to dismiss claims by Mexican nationals who alleged they were not fairly paid for work in the United States during and after World War II. The district court expressly distinguished this case:

> Nor is there here, as there was [in *Garamendi*], evidence produced by the defendants that the United States government has consistently reaffirmed a policy of non-judicial dispute resolution for the particular claims at issue.

Id. at 1073-74.[12]

3. *Amici* Misapprehend The President's Claims-Settlement Power

The *amici* law professors and twelve members of Congress again argue, as they did in the Second Circuit, that the President is powerless to preempt claims connected to the resolution of wars and other

---

[12] *Accord Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493, 498 (W.D. Tex. 2005) ("the Court is unconvinced that Congress intended that all claims against American corporations should be handled by the FCSC."); *see In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 79-80 (E.D.N.Y. 2005)(claims brought by Vietnam citizens for injuries caused by Agent Orange; *Garamendi* "not relevant to the problem at hand -- determining what was the applicable international law during the Vietnam War."); *see also id.* at 77-78 ("A significant distinguishing feature of the Vietnam War is the absence of Executive and Legislative decisions regarding reparations following termination of hostilities, in stark contrast to the large number of such decisions following World War II.").

foreign relations matters in the face of supposed Congressional opposition or State common law.

First, this is *not* a case involving Congressional opposition to Executive policies, within the meaning of "Justice Jackson's familiar tripartite scheme." *Medellin v. Texas,* 552 U.S. 491, 524-25 (referring to Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-38 (1952)). Congressional views in opposition are not manifested in an *amicus* filing by a tiny fraction of the members of the House. To the contrary, this is a case involving Congressional *support* for Executive policies, within the context of Justice Jackson's tripartite scheme. In *Garamendi,* the Court highlighted Congress's tacit *agreement* with the President's policy that all Holocaust-era insurance claims be resolved through ICHEIC:

> Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law. In sum, Congress has not acted on the matter addressed here. Given the President's independent authority "in the areas of foreign policy and national security, . . . congressional silence is not to be equated with congressional disapproval."

539 U.S. at 429 (quoting *Haig v. Agee,* 453 U.S. 280, 291 (1981)) (citations to former failed bills omitted; ellipsis original).

Moreover, in the years after *Garamendi*, additional proposed legislation to support Petitioner and other claimants, for which Petitioner's counsel and the lead House member named on the relevant *amicus* filing have been the primary champions, has been introduced but not advanced. *See* H.R. 1746, 110th Cong., 1st Sess. (2008); H.R. 4596, 111th Cong., 2nd Sess. (2010).

Nor is there force to the academic views of the *amici* law professors.[13] Their opinion that Executive foreign affairs powers should be narrowed as to give way to claims under state common law is contrary to accepted constitutional doctrines. As the *Garamendi* Court stated:

> [T]he President possesses considerable *independent* constitutional authority to act on behalf of the United States on international issues, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.

539 U.S. at 424 (citation omitted; emphasis added).

---

[13] The lead counsel for the *amici* law professors, Michael D. Ramsey, is a leading "Federalist" pressing for the narrowing of Executive power. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan L. Rev. 1963, 1965 (2003). Prof. Ramsey's views pre-date *Garamendi*, *see* Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133 (1998), and he, along with his co-*amici*, has been a vocal critic of the decision. *See* Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi* and Executive Preemption in Foreign Affairs, 46 Wm. & Mary L. Rev. 825 (2004).

A less partisan academic has explained that the position espoused by the *amici* professors, and adopted by the *amici* House members, is inconsistent with mainstream law:

> Professor Michael Ramsey, representing the federalist position, contends that . . . [executive] agreements can never supersede state law. In contrast, the *Restatement (Third)* [*of Foreign Relations Law*] . . . says that the Tenth Amendment does not limit the President's power to make sole executive agreements, and that "[a] sole executive agreement made by the President on his own constitutional authority is the law of the land and supreme to State law."

David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan L. Rev. 1963, 1965 (2003).

The third *amici*, the California State Senate -- which passed the law that was stricken in *Garamendi* -- argues speciously that the President and the Second Circuit somehow invalidated the common law of contracts and torts (presumably of Florida, where Petitioner sued). But the Executive merely specified the procedure by which Petitioner's claim should be resolved, and the court effectuated this as a matter of foreign policy by preempting a particular claim. The legal theories underlying Petitioner's lawsuit remain fully in force -- they simply have been precluded from application in this narrow context. There accordingly is no basis for the concern that the state legislature could find it

difficult to adopt laws of general applicability without further "clarification" from this Court. The opinion below no more invalidated the contract or tort law of Florida than *Dames & Moore v. Regan*, 453 U.S. 654 (1981), discussed *infra*, invalidated the contract law of California in disallowing an already-granted $3.4 million summary judgment awarded to Dames & Moore on its contract claim against Iran in favor of mandatory binding arbitration.

B. The Absence Of An Executive Agreement Between The United States And Italy Is Immaterial

1. *Garamendi* Is Based On Conflict With Presidential Foreign Policy, Not Executive Agreements

From its first sentence, the Petition is premised on the erroneous argument that *Garamendi* turned on the preemptive effect of *executive agreements* with foreign governments, rather than the *foreign policy* that the agreements embodied. *See* Pet., Question Presented ("In [*Garamendi*], this Court held that a California statute requiring European insurance companies to disclose Holocaust-era insurance policies was preempted by executive agreements with Germany and Austria which provided an alternative forum for resolution of such claims."). The congressional *amici* echo that reading of *Garamendi*, which *Garamendi* itself rejected.[14]

---

[14] The California State Senate *amici*, by contrast, part company on this point and correctly appreciate that the *(cont'd)*

In *Garamendi,* the Court framed the dispute and its holding as turning on *foreign policy* preemption, not *executive agreement* preemption. At the outset of its analysis, the Court acknowledged that the executive agreements entered into by the Clinton Administration did not themselves preempt the California legislation, but that any preemption would have be based upon a conflict with the President's foreign policy:

> [V]alid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward. But petitioners and the United States as *amicus curiae* both have to acknowledge that the agreements include no preemption clause, and so leave their claim of preemption to rest on *asserted interference with the foreign policy* those agreements embody.

539 U.S. at 416-17 (citations and footnote omitted; emphasis added).

Thus, in nullifying California's attempt to assist prospective litigants, the *Garamendi* Court expressly based its holding on the conflict between

---

(cont'd from previous page)
Executive policy vindicated in *Garamendi* "was not contained in a single executive agreement." Brief of Amicus Curiae California State Senate at 10 (citing *Movsesian v. Versicherung*, 578 F.3d 1052, 1056 (9th Cir. 2008) (citing *Garamendi*)).

the President's foreign policy (not on any executive agreement) and California's approach:

> The question relevant to preemption in this case is conflict, and the evidence here is "more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives."

Id. at 427, *quoting Crosby v. National Foreign Trade Council,* 530 U.S. 363, 386 (2000) (emphasis added; alteration original). Thus, this Court carefully noted that executive agreements were mere "exemplars" of the federal policy reflected in many other statements by representatives of the Executive. *Id.* at 422.[15]

It is for that reason also that *Garamendi* relied substantially on *Zschernig v. Miller,* 389 U.S. 429 (1968), which involved no Executive Agreement, and where the Court struck an Oregon probate statute prohibiting inheritance by nonresident aliens from Communist countries, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress," *id.* at 432, and not because of any executive agreement. *Accord id.* at 440 (state laws

---

[15] *Garamendi* explicitly credited the statements by officials from the Clinton, Bush and Obama Administrations on the issue of Holocaust-era insurance claims established Executive Branch policy. *See* 539 U.S. at 423 n.13. In the face of the findings in *Garamendi* and the declarations of Executive policy by the Bush and Obama Administrations in this case, it strains credulity for the congressional *amici* to argue that the lower court here was simply "guessing" or seeking out the "hidden" content of that policy.

"must give way if they impair the effective exercise of the Nation's foreign policy").

And, confirming that the *policy* conflict on which *Garamendi* turned was not tethered to any Executive Agreement, the Second Circuit recognized (as had the district court also) that Generali was a plaintiff in *Garamendi*, and despite vocal arguments by California about the absence of any executive agreement applicable to it, this Court did not craft an exception or exclusion for Generali to the holding nullifying California's statute:

> A further indication that the Court did not view the existence of an executive agreement as a prerequisite is that Generali was one of the plaintiffs in *Garamendi*, and was not excluded from the judgment on the ground that it is an Italian company and Italy is not party to an executive agreement.

592 F.3d at 119.

Is it therefore not surprising that the Second Circuit said about Petitioner's argument that it reads *Garamendi* unduly narrowly, because this Court based preemption on conflict with the Executive Branch's foreign policy, and not simply with the Executive Agreements embracing or reflecting that policy. *See* 592 F.3d at 116 ("The Court in *Garamendi*, however, did not find that the United States policy of encouraging resolution of Holocaust-era insurance claims through the ICHEIC depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the

product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it.").

By arguing that, absent an executive agreement between the United States and Italy, there is no basis for his complaint to be preempted, *see* Pet. at 12-18, Petitioner (and the *amici* who repeat that argument) simply take issue with *Garamendi* itself and with the Second Circuit's unremarkable application of that decision. This is not a basis for certiorari review.

2. Neither Lower Court Applications Of *Garamendi* Nor The Court's *Medellin* Decision Provides A Basis For Review

Petitioner contends that the lower courts are purportedly applying *Garamendi* differently than the Second Circuit. Even if true, this would not be a basis for certiorari review. But it is, in any event, not correct. For example, the Second Circuit's own earlier decision in *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57, 59 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2865 (2006), involved a putative class action against the Republic of Austria and various Austrian entities, to recover for compulsory confiscation of property in Austria during the Holocaust. The court found the claims to be nonjusticiable because of the Executive Branch's plenary authority over matters concerning the nation's foreign affairs. *Id.* at 71. That prior holding

of the Second Circuit is entirely consistent with the ruling in this case.[16]

Nor does *Medellin v. Texas*, 552 U.S. 491 (2008), which in relevant respects concerns federal involvement with state criminal procedures, not the long-recognized Executive power to compromise claims following a foreign war, cast doubt on *Garamendi* or the Second Circuit's ruling. *Medellin* concluded simply that a Presidential memorandum was insufficient to impart binding effect to a non-self-executing treaty, and that the treaty could become binding only through Congressional action, because the circumstances under which such treaty is ratified preclude the argument that Congress authorized the Executive to effectuate the treaty's ends on his own. *See id.* at 525-27. In so holding, however, this Court *expressly* distinguished *Medellin* from those cases involving foreign claims-settlements, including *Garamendi*, which were all supported by a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned", unlike the "unprecedented action" at issue in *Medellin*. *See id.* at 530-32 (quoting *Garamendi* with approval for the proposition that "the conclusion that the President's control of foreign relations includes the settlement of

---

[16] In *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005), Iraqi nationals sued government contractors for alleged torture at Abu Ghraib prison. The court denied the defendants' motion to dismiss on political question and preemption grounds, because the Government had not taken a firm position on how such claims should be resolved. *Id.* at 16. There is no comparable ambiguity as to Executive Branch policy as regards Holocaust-era insurance policies.

claims is indisputable"). Indeed, nowhere in the Court's discussion of *Garamendi* in *Medellin* is there even a hint that *Garamendi* is no longer good law. To the contrary, far from limiting *Garamendi*, as the *amici* professors suggest, *Medellin* confirms *Garamendi's* strong and continuing vitality.

C. The Remedy Chosen By The President Remains Available To Petitioner

The Petition's concluding argument, that *Garamendi* ought not to apply where a plaintiff is left with no possibility of relief, *see* Pet. at 19-20, is based on the false premise that no relief is (or was) available to Petitioner. Rather, he eschewed all past and existing remedies, and his real complaint is that his preferred forum is unavailable. As made clear by the United States' submission to the Second Circuit, Petitioner today, and in the future, can apply either directly to Generali or to the New York Holocaust Claims Processing Office, and he again will be offered the $5,800 that ICHEIC's claimant-friendly valuation standards provide for in his circumstances. *See* Pet. App. 77a. Indeed, that amount would be adjusted upward in light of the passage of time since Generali first made ICHEIC offer years ago.

In any event, this Court long-since held that the power of the Executive to compromise or settle claims -- even to the extent of stripping the claimant of a judicial award -- in advancing the Government's foreign affairs interests is unaffected by the claimant's consent or even the availability of *any* alternative remedy. Thus, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Court upheld Presidential orders nullifying claims filed in U.S.

courts by U.S. nationals against Iran, based in part on precedents recognizing broad Executive authority. *Id.* at 679-80 ("it is also undisputed that the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.") (citation and quotation omitted). The President's power to do so "does not depend on his provision of a forum whereby the claimants can recover on those claims." *Id.* at 687. Thus, the absence of any remedy, let alone Petitioner's preferred remedy, is not a basis for challenging the opinion below much less for certiorari review.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Dated: August 20, 2010

Respectfully submitted,

MARCO E. SCHNABL
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

PETER SIMSHAUSER
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, MA 02108
(617) 573-4800
Peter.Simshauser
@skadden.com

Attorneys for Respondents

No. 10-80

IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,
DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A. and
BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

SAMUEL J. DUBBIN
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

ERWIN CHEMERINSKY
Counsel of Record
University of California,
Irvine School of Law
401 E. Peltason
Irvine, CA 92697-8000
(949) 824-7722
EChemerinsky@law.uci.edu

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G St., NW
Suite 500
Washington, DC 20005
(202) 652-4511

Attorneys for Petitioner

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Introduction 1

Argument 5

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO THE PLAINTIFFS 5

A. Does *Garamendi* Preempt State Common Law Claims? 5

B. Does *Garamendi* Apply in the Absence of an Executive Agreement? 7

C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possible Relief? 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

In re Agent Orange Product Liability Litigation, 373 F.Supp.2d 7 (E.D.N.Y. 2005) 6

American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003) ..... *passim*

Central Valley Chrysler-Jeep v. Witherspoon, 456 F.Supp.2d 1160 (E.D. Cal. 2006) 11

Barclay's Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994) 10

Ibrahim v. Titan Corp., 391 F.Supp.2d 10 (D.D.C. 2005) 11

Medellin v. Texas, 552 U.S. 491 (2008) 9, 10

Movesian v. Victoria Versicherung AG, 578 F.3d 1052 (9th Cir. 2009) 11

Schydlower v. Pan American Life Insurance Co., 231 F.R.D. 493 (W.D. Tex. 2005) 6

United States v. Pink, 315 U.S. 203 (1942) 7

Cited Authorities

Page

Whiteman v. Dorotheum GmbH & Co. KG,
431 F.3d 57 (2d Cir. 2005) 11

Rules

Fed. R. Civ. P. 12(b)(6) 3

Miscellaneous

Yisroel Schulman, *Holocaust Era Claims: Mission Not Accomplished*, New York Jewish Week, May 4, 2007 444

INTRODUCTION

In *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court held that a California statute requiring disclosure of Holocaust-era insurance policies was preempted by an executive agreement. Respondent, Assicurazioni Generali, S.p.A. [hereafter, "Generali"] opposes certiorari on the ground that the lower courts in this case "simply applied *Garamendi*." Brief in Opposition at i.

But the Second Circuit went far beyond *Garamendi* in concluding that decision resolved the very different circumstances of this case. First, the issue in *Garamendi* was whether a state statute, California's Holocaust Victim Insurance Relief Act ("HVIRA"), was preempted by federal law. Here, Petitioner's claims arise under long-standing state common law causes of action. Second, in *Garamendi*, there was an executive agreement negotiated between the United States and Germany. In this case, there is no executive agreement, and no opposition to the suit by the Italian government. Preemption is based solely on a letter from the United States Department of Justice asserting that lawsuits against Generali conflict with United States foreign policy. Finally, the claimants in *Garamendi* had recourse to the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). Here, ICHEIC is no longer available because it had a December 31, 2003 deadline for accepting claims.

In *Garamendi*, this Court emphasized all of these factors in concluding that the California statute was preempted. Generali opposes certiorari by asserting

that none of these three differences matters at all. But whether these distinctions matter is precisely the issue presented in the certiorari petition and what this Court needs to decide: Whether common law state claims are preempted by federal foreign policy interests where no executive agreement exists and where Petitioner has no other recourse.

Indeed, as explained in the petition for certiorari and by the *amici* urging the grant of certiorari, lower courts, in an array of different contexts, are split over whether the distinction between common law claims and statutory claims matters for the purposes of preemption, and whether preemption based on foreign policy interests can be found in the absence of an executive agreement. This case provides an ideal vehicle for this Court to address these unresolved issues of national importance presented in the wake of *Garamendi*.

Generali tries to minimize the importance of this case by trivializing the size of the claim and the number of claimants.[1] Its assertions in this regard have no basis in the record. For example, without citation, Generali

---

1. There is also an oddly *ad hominem* tone to much of Generali's Brief in Opposition as it attacks co-counsel for the Petitioner (*id.* at 8), Petitioner himself (*id.* at 1), counsel for the *Amici Curiae* Professors of Constitutional Law and Foreign Relations Law) (*id.* at 21), and even members of the California State Senate and the United States Congress who filed separate amicus briefs urging certiorari. (*id.* at 20, 21). Although it is tempting to respond and set the record straight, the important point is that none of these attacks in any way deny the fact that the Second Circuit substantially extended this Court's decision

(Cont'd)

asserts that "Petitioner's case concerns a 1936 Czech insurance policy issued in local currency worth some $165 at pre-war exchange rates and valued at approximately $5,800 under ICHEIC's claimant-friendly methodology." Brief in Opposition at 1. But the Complaint alleges quite different facts and these allegations must be taken as true since this appeal arises from the granting of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Complaint states in Paragraphs 31 and 32:

> 31. In 1937, Joseph Schreiber (Generali's local agent) sold Pavel Weiss at least one life and annuity insurance policy from Generali . . . . On information and belief, Pavel Weiss also purchased property, casualty, and fire insurance policies from Generali.
>
> 32. The life/annuity policy Pavel Weiss purchased from Generali was linked to the American dollar ("New York Dollar Check") and to Gold. At the time of the purchase, the policy was worth Fifty Thousand U.S. dollars ($50,0000). Pavel Weiss fully prepaid the premium in full at the time of purchase.

(Cont'd)
in *Garamendi* and that its decision raises important, unresolved issues. The *amicus* briefs, by members of Congress, by members of the California State Senate, and by leading law professors, powerfully demonstrate that this case raises crucial issues of national importance concerning when federal executive policy preempts state law.

In addition, Paragraphs 33-39 of the Complaint describe by name other relatives of Petitioner Weiss who "on information and belief" were insured by Generali, including his father's first wife, his three children, and his six brothers and sisters. All of these individuals were killed in the Holocaust.

Generali ignores the Complaint and plaintiff's allegations of many possible insurance claims against Generali worth potentially a very large sum of money. It is inappropriate for Generali to substitute its view of the facts, without citation, and before there has been the chance for discovery or fact-finding.

Nor is it correct that Petitioner is the only person with possible claims against Generali for its unpaid insurance policies to heirs of victims of the Holocaust. As Generali admits, about 200 claimants opted out of the class action suit against it. Brief in Opposition at 8. These individuals potentially could bring claims if this Court grants certiorari and reverses the Second Circuit.[2]

---

2. Generali asserts that of those who opted out "most ... are citizens of foreign countries or have not even claimed that they or their families ever purchased a Generali policy." Brief in Opposition at 8. There is nothing in the record about the citizenship of these individuals; nor would it matter in terms of their ability to sue Generali. These individuals were part of the class action against Generali because they had potential claims against it for unpaid insurance policies. These claimants included several survivors and heirs with well-documented claims against Generali. *See, e.g.*, Yisroel Schulman, *Holocaust Era Claims: Mission Not Accomplished*, New York Jewish Week, May 4, 2007.

But whether there are 20 or 200 other claimants, the important issue remains as to whether their common law claims can be preempted based on a letter from the Department of Justice asserting a foreign policy interest in the absence of an executive agreement and when no other forum exists to provide a remedy. The Second Circuit significantly extended the reach of *Garamendi* and this Court should grant review to resolve a conflict among the lower courts and decide whether there is preemption in these circumstances.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE AND AN ISSUE WHICH IS SPLITTING THE LOWER COURTS CONCERNING WHEN STATE COMMON LAW LIABILITY IS PREEMPTED IN THE ABSENCE OF AN EXECUTIVE AGREEMENT AND WHERE NO OTHER FORUM WOULD BE AVAILABLE TO THE PLAINTIFFS.

A. Does *Garamendi* Preempt State Common Law Claims?

This Court's decision in *Garamendi* addressed whether federal law preempted a California statute which required insurance companies doing business in California to disclose their Holocaust-era policies. The Court explained that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." 539 U.S. at 423. This Court stressed that

this was an attempt by California to act in a matter not traditionally the focus of state regulation and to do so with "an iron fist." *Id.* at 425, 427.

This case, though, does not involve a state statutory scheme meant specifically to achieve foreign policy objectives. In this case, the issue is whether the Petitioner's common law claims are preempted. Unlike the statute adopted by California, the common law claims here were not created to regulate matters of foreign policy. The state has a much greater interest in vindicating its long-standing common law. In fact, in *Garamendi*, this Court distinguished the preempted California statute from "a generally applicable 'blue sky law.'" 539 U.S. at 425-26. This case presents the kind of generally applicable, facially neutral law expressly not considered in *Garamendi*.

The Second Circuit, however, rejected this distinction and found preemption of the common law claims. By contrast, other courts have found that *Garamendi* is limited to preempting state statutes. *See, e.g., Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005); I*n re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005). While Respondent is correct that these cases did not address "Holocaust-era claims of any nature, let alone Holocaust-era insurance claims" (Brief in Opposition at 17), the courts did come to the opposite conclusion from the Second Circuit as to the underlying issue of whether *Garamendi* applies differently to common law claims as compared to statutes.

Generali argues that the distinction between preemption of state common law and preemption of state statutes is irrelevant because "as regards U.S. foreign relations, the 'states do not exist,'" and "[n]o State can rewrite our foreign policy to conform to its own domestic policy." Brief in Opposition at 15 (quoting *United States v. Pink*, 315 U.S. 203, 233-34 (1942)). Generali says that the amici California State Senate "argues speciously that the President and the Second Circuit somehow invalidated the common law of contracts and torts." *Id.* at 21.

But Petitioner and its *amici* take no issue with the view that foreign policy, duly established by the federal government through a statute, treaty, or executive agreement, supersedes conflicting state law. There is nothing specious, however, in challenging the Second Circuit's contention that generally applicable state laws are entitled to no deference, and that preemption can be found merely upon the assertion of an administrative official that the state law may inconvenience a present or future executive branch policy. *Garamendi* is not authority for that result. State legislatures and the federal courts would benefit from this Court's clarification as to when state common law claims are preempted by assertions of federal foreign policy interests.

B. Does *Garamendi* Apply in the Absence of an Executive Agreement?

In finding preemption in *Garamendi*, this Court was explicit in emphasizing that there was an executive agreement between the United States and foreign

nations. Justice Souter, writing for the Court, began his legal analysis by stating: "The principal argument for preemption made by petitioners and the United States as amicus curiae is that HVIRA interferes with foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France." *Garamendi*, 539 U.S. at 413. The Court emphasized the authority of the President "to make executive agreements with other countries," *id.* at 415, and after several pages of reviewing the history of such agreements, it concluded that executive agreements, like treaties, generally preempt state law. *Id.* at 416-17. This Court found that "[a]s for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria" provided a basis for preemption of California's statute. *Id.* at 421.

In this case, by contrast, there is no executive agreement between the United States and Italy. Generali argues that "the absence of an executive agreement between the United States and Italy is immaterial; *Garamendi* is based on conflict with presidential foreign policy, not executive agreements." Brief in Opposition at 22. But contrary to Generali's assertion, it does not follow "*a fortiori*" (*id.* at 17) that because there is preemption when there is an executive agreement, there also is preemption any time an Executive Branch official asserts a foreign policy interest. An executive agreement is a formally adopted policy of the United States that is signed by the President of the United States. Congress, if it disagrees, may override an executive agreement by enacting a statute. In this case, though, preemption is based on a

letter from the United States Department of Justice. Whether that is sufficient to establish the foreign policy interests of the United States and whether that is sufficient to preempt state law are exactly the issues raised by this case and warranting Supreme Court review.

This is precisely the point raised in both the Brief of *Amici Curiae* of Professors of Constitutional Law and Foreign Relations and the Brief of Rep. Ileana Ros-Lehtinen and Eleven Additional Members of Congress. Each of these briefs expresses grave concerns about how the Second Circuit's approach greatly expands presidential power and the scope of preemption of state law. [3]

This Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008), strongly supports Petitioner's position and necessitates this Court's clarifying the scope of preemption under *Garamendi*. In *Medellin*, this Court held that even a "plainly compelling" presidential foreign policy could not displace an otherwise valid state law.

---

3. Generali's reaction to the arguments in these *amicus* briefs is curious. It quotes a law review article disagreeing with the author of the law professors' brief, which was signed by eight other distinguished professors, but never responds to the argument presented as to how the Second Circuit significantly expanded presidential power. Brief in Opposition at 21. Generali responds to the *amicus* brief by 12 members of Congress by saying that the named *amicus* has tried unsuccessfully to enact legislation to deal with the issue. *Id.* at 20. But this does not answer *amici's* basic point: allowing preemption on the basis of a letter from the Department of Justice dangerously expands executive power.

Id. at 524. The Court expressly rejected the claim that the President had the unilateral power to preempt Texas law in order to enforce a non-self-executing treaty.

Yet, in this case, the Second Circuit found preemption based on a letter from an official in the Department of Justice. This cannot be reconciled with *Medellin*. Nor can it be reconciled with this Court's earlier decision in *Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994), which concluded that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned [laws]."

Generali says that *Medellin* is distinguishable from this case because here there is a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."[4] Brief in Opposition at 27. But this is far from an accurate description of the executive position as it relates to claims against Generali. In 2000 and 2001, Generali sought a statement of interest from the Clinton Administration asserting that United States foreign policy interests favored dismissal. The Clinton Administration refused to accede to Generali's repeated

4. Generali argues that Congress's failure to act provides implicit approval of the presidential policy to make ICHEIC the exclusive remedy. Brief in Opposition at 19. This would be a stunning expansion in executive power as state laws would be deemed preempted whenever a mid-level Executive Branch officials asserts a foreign policy interest unless Congress passes corrective legislation. Congress's failure to act in these circumstances is not a basis for inferring approval.

requests because there was no executive agreement with Italy. Respondent Generali points to no instance in which the Executive Branch sought dismissal of claims against Italian insurance companies except in this case in response to requests from the Second Circuit. That is hardly a "systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned."

Not surprisingly, confusion has developed in the lower courts as to whether an executive agreement is needed to preempt state claims. *Compare Movesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009) (no executive agreement needed for preemption); *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F.Supp.2d 1160, 1179 (E.D. Cal. 2006) (same); with *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005); *Ibrahim v. Titan Corp.*, 391 F.Supp.2d 10 (D.D.C. 2005) (executive agreement or treaty needed for preemption). Generali does not, and cannot, deny this conflict, which warrants clarification by this Court.

C. Does *Garamendi* Apply When the Effect is to Leave the Plaintiffs' With No Possible Relief?

In *Garamendi*, this Court implied that, in light of the executive agreement, the appropriate forum for plaintiffs to raise their claim was the International Commission on Holocaust Era Insurance Claims (ICHEIC). The Second Circuit, based on *Garamendi*, concluded that federal law mandated that claims against Generali be brought in the ICHEIC. But there is a key difference: ICHEIC is no longer available to hear claims. It had a December 31, 2003 deadline for accepting claims.

Even when it did exist, the ICHEIC provided only very limited relief and only for a small percentage of claimants. Ironically, the four dissenting justices in *Garamendi* made this point by looking at claims against Generali. Justice Ginsburg, in a dissent joined by Justices Stevens, Scalia, and Thomas, observed: "At least until very recently, however, ICHEIC's progress has been slow and insecure. . . . Initially, ICHEIC's insurance company members represented little more than one-third of the Holocaust-era insurance market. . . . [I]t remains unclear whether ICHEIC does now or will ever encompass all relevant insurers. Moreover, ICHEIC has thus far settled only a tiny proportion of the claims it has received. Evidence submitted in a series of class actions filed against Italian insurer Generali indicated that by November 2001, ICHEIC had resolved only 797 of 77,000 claims. The latest reports show only modest increases." 539 U.S. at 432-33 (Ginsburg., J., dissenting).

Generali says that Petitioner has a remedy: he could apply directly to Generali or to the New York Holocaust Claims Processing Office. Brief in Opposition at 28. But this litigation is occurring precisely because of Generali's consistent refusal to pay on its Holocaust-era policies and Respondent offers not a shred of evidence that the New York Holocaust Claims Processing Office can provide plaintiff with any form of meaningful relief.

CONCLUSION

Respondent's argument against certiorari is that the Second Circuit's decision followed "*a fortiori*" from *Garamendi*. Brief in Opposition at 17. But that is not right because unlike *Garamendi* this case involves no state statute, there is no executive agreement, and there is no forum available for recourse. This Court should grant review to clarify the important issue of whether preemption exists in such circumstances.

Respectfully submitted,

SAMUEL J. DUBBIN
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

ERWIN CHEMERINSKY
Counsel of Record
University of California,
Irvine School of Law
401 E. Peltason
Irvine, CA 92697-8000
(949) 824-7722
EChemerinsky@law.uci.edu

JONATHAN S. MASSEY
MASSEY & GAIL, LLP
1325 G St., NW
Suite 500
Washington, DC 20005
(202) 652-4511

Attorneys for Petitioner

168

(2)

No. 10-80

Supreme Court, U.S.
FILED
AUG 13 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS WEISS,

Petitioner,

v.

ASSICURAZIONI GENERALI, S.P.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA STATE SENATE IN SUPPORT OF PETITIONER

DIANE F. BOYER-VINE
Legislative Counsel of California
State Capitol, Suite 3021
Sacramento, CA 95814-3702
(916) 341-8123
diane.boyer@lc.ca.gov

Attorney for Amicus Curiae

231680

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
INTRODUCTION AND STATEMENT OF THE CASE	2
THE SECOND CIRCUIT'S DECISION IN THIS CASE CONTRAVENES *GARAMENDI* AND ITS PROGENY	3
IF LEFT UNDISTURBED, THE SECOND CIRCUIT'S DECISION WILL UNDULY HAMPER THE CALIFORNIA STATE SENATE'S ABILITY TO PROVIDE FOR THE PROTECTION OF ITS CONSTITUENTS	8
CONCLUSION	15

TABLE OF AUTHORITIES

Page

Cases

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) ..... *passim*

Hillsborough Co., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707 (1985) 11

In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 340 F.Supp.2d 494 (S.D.N.Y. 2004) . 3

In re Assicurazioni Generali S.P.A., 592 F.3d 113 (2d Cir. 2010) 2, 3, 8, 10

Kelly v. Wash. ex rel. Foss Co., 302 U.S. 1 (1937) ... 8

Medellin v. Texas, 552 U.S. 491 (2008) 5, 6

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 11

Movsesian v. Versicherung, 578 F.3d 1052 (9th Cir. 2008) 6, 7, 10

People v. Garcia, 39 Cal.4th 1070 (Cal. 2006) ... 13

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 11

Schydlower v. Pan Am. Life Ins. Co., 231 F.R.D. 493 (W.D. Tex. 2005) 7

Authorities

Page

Taiheiyo v. Sup. Ct., 117 Cal. App. 4th 380 (Cal. Dist. Ct. App. 2005) 7

Vasquez v. Hillery, 474 U.S. 254 (1986) 13

Statutes

California Holocaust Victim Insurance Relief Act of 1999 ..... *passim*

Rules

Supreme Court Rule 37.2 1

Other Authorities

Frederick M. Abbott & Graham Dukes, *Global Pharmaceutical Policy: Ensuring Medicines for Tomorrow's World*, 13 DePaul J. Health Care L. 103 (2010) 12

Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, *U.S. International Trade in Goods and Services* (Apr. 9, 2009) 12

Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351 (2002) . 12

INTEREST OF THE *AMICUS CURIAE*

Amicus, the California State Senate, submits this brief pursuant to Supreme Court Rule 37.2 in support of the Petition for a Writ of Certiorari. Counsels of record for all parties have received timely notice of the intent to file this brief. All parties have given consent to the submission of this brief.[1]

The California State Senate, as part of the California State Legislature, passes laws to provide for the health, safety, and welfare of the residents of California pursuant to the states' constitutionally reserved police powers. The ability of the states to enact statutes of general applicability pursuant to their police powers has traditionally been afforded great deference by the courts.

The decision of the court of appeals below, however, is based on the view that state laws which are facially neutral with respect to matters of foreign policy are categorically preempted pursuant to the Executive's foreign policy power, even if the state law has only an unintended and peripheral effect on international affairs. Given that prior authority from this Court permits federal foreign policy to preempt state law based on nothing more than an informal statement from a mid-level member of the Executive Branch, the

---

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution.

decision below is significant, undermining cardinal principles on which the American legal system is premised. The holding of the court of appeals will undermine the California State Senate's ability to enact statutes of general applicability to protect the welfare of millions of California residents without the risk of federal preemption.

Amicus has a direct interest in maintaining the predictability of the legal system of California, and therefore urges the Court to grant certiorari and reverse the decision below. Accordingly, *amicus* California State Senate submits this brief to assist the Court in the resolution of this case.

INTRODUCTION AND STATEMENT OF THE CASE

This Court has held that state statutes of general applicability are entitled to greater deference in foreign policy preemption analysis than statutes of limited application that are intended to regulate within the field of foreign policy. Likewise, common law causes of action have received deferential treatment. In the decision below, *In re Assicurazioni Generali S.P.A.*, 592 F.3d 113 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit ("Second Circuit") ignored these important distinctions and improperly affirmed the dismissal of all of Petitioner's causes of action. Not only does this holding depart from the holding of *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and its progeny, but, if permitted to stand, it poses a substantial threat to the ability of the California

State Senate to provide for the health, safety, and welfare of California residents.

Accordingly, this Court should grant the Petition for a Writ of Certiorari in this case. *Garamendi* made a substantial change in foreign policy preemption jurisprudence, but the parameters set by *Garamendi* have been confused by the *Generali* ruling. Clarification should be provided to the lower courts so that errors such as those committed by the Second Circuit in this case will not be repeated in the future.

THE SECOND CIRCUIT'S DECISION IN THIS CASE CONTRAVENES *GARAMENDI* AND ITS PROGENY

The Second Circuit improperly applied the *Garamendi* preemption analysis by ignoring the distinction between state statutes that directly address foreign policy matters and state statutes of general applicability and common law causes of action. *Generali*, 592 F.3d at 1119. Rather than addressing this analytical distinction, the Second Circuit simply asserted that "[t]he state law must yield to the federal policy, *regardless of the importance of the interests behind the state law*." *Id.* (emphasis added). This view mirrors the *Generali* ruling at the district court level, where the court, in striking down both Petitioner's benefit claims arising under state holocaust statutes, and those arising "under generally applicable state statutes and common law," concluded that "the legal justification for such claims is irrelevant." *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litigation*, 340 F.Supp.2d 494, 501 (S.D.N.Y. 2004). As this blanket conclusion is contrary

not only to *Garamendi* but also subsequent cases interpreting *Garamendi*, it is crucial that the Court remedy this error.

In *Garamendi*, this Court invalidated the California Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"). *Garamendi*, 539 U.S. at 429. The California Legislature passed the HVIRA in the midst of ongoing international efforts to provide reparations to Holocaust victims and their heirs. *Id.* at 408-09. As part of these international efforts, President Clinton entered into an Executive Agreement with Germany providing for the processing of Holocaust-era insurance claims through the International Commission on Holocaust Era Insurance Claims. *Id.* at 406-07. As part of this agreement, if a lawsuit is filed against a German company on a Holocaust-era claim in an American court, the Government of the United States is to submit a letter to the court, declaring that it would be in the United States' foreign policy interests if the case was dismissed on any valid legal ground. *Id.* at 406.[2]

The HVIRA required any insurer doing business in California to disclose the details of specified insurance policies that were issued "to persons in Europe, which were in effect between 1920 and 1945." *Id.* at 409-10.

While the *Garamendi* majority found a clear conflict between the foreign policy on Holocaust claims expressed by the Executive Branch and the HVIRA,

---

[2] As discussed, *infra*, the *Garamendi* majority also relied on statements of sub-Cabinet level officials to determine the expressed foreign policy interests of the President.

the Court took care to differentiate between laws specifically targeted at areas of foreign policy, such as the HVIRA, and "blue sky" laws, or statutes of general applicability. *Id.* at 426-27. Reciting the view of Justice Harlan, the *Garamendi* majority recognized that legislation within areas of state legislative "traditional competence" may prevail in a case involving potential federal preemption, as it is "reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Id.* at 420 (citations omitted). Likewise, the *Garamendi* majority noted that "[w]here . . . a State has acted within . . . its 'traditional competence,' . . . but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." *Id.* at 420, n.11 (citations omitted).

In sum, foreign policy preemption analysis differs according to the nature of the state legislative interest. *Garamendi* supports the proposition that, with respect to state laws of general applicability, which are thus *not* intended to intervene into the foreign policy realm, the interests of the state must be given weight, and only a substantial conflict should warrant preemption. With the exception of the holding of the Second Circuit in this case, which fails to even consider the weight to be accorded state interests, courts interpreting *Garamendi* have followed that view.

For example, in *Medellin v. Texas*, 552 U.S. 491 (2008), the Supreme Court held that a presidential

memorandum purporting to apply the terms of a treaty to supersede existing state law did not carry with it preemptive force. *Id.* at 496. The Court disfavored the memorandum in part because it was "a directive issued to state courts that would compel those courts to reopen final criminal judgments and set aside *neutrally applicable state laws*." *Id.* (emphasis added).

The distinction between state laws of general applicability and those expressly directed to matters of foreign policy was further emphasized by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Movsesian v. Versicherung*, 578 F.3d 1052 (9th Cir. 2008). At issue in *Movsesian* was a California statute that, in a manner similar to the HVIRA, extended the time to file suit in California courts to December 31, 2010, for insurance claims based on the "Armenian Genocide." *Id.* at 1054. The President, however, had expressed dissatisfaction with the recognition of an "Armenian Genocide" on several occasions. *Id.* at 1057-59. While the Ninth Circuit acknowledged that the statute at issue was very similar to the HVIRA, and was thus preempted by the foreign policy expressed by the Executive, the court made certain to distinguish this special statute from laws of general applicability:

> Here, as in *Deutsch* and *Garamendi*, California's "real desiderata" is to provide a forum for the victims of the "Armenian Genocide" and their heirs to seek justice. *Garamendi*, 539 U.S. at 425, 123 S.Ct. 2374; *Deutsch*, 324 F.3d at 707. By opening its doors as a forum to all "Armenian Genocide" victims

> and their heirs and beneficiaries, California expresses its dissatisfaction with the federal government's chosen foreign policy path. *Garamendi* and *Deutsch* clearly hold that this is not a permissible state interest. *Garamendi*, 539 U.S. at 427, 123 S.Ct. 2374; *Deutsch*, 324 F3d at 712.

Id. at 1062-63.[3]

Finally, in *Schydlower v. Pan American Life Insurance Co.*, 231 F.R.D. 493 (W.D. Tex. 2005), plaintiff made claims based in common law relating to an insurance policy that originated in Cuba prior to the communist overthrow of the Cuban government. *Id.* at 495-97. Defendant cited *Garamendi* for the proposition that these claims were preempted by the Foreign Claims Settlement Commission, which was created by Congress to determine the amount and validity of claims against the Cuban government. *Id.* at 497. In rejecting this argument, the *Schydlower* court stated that it understood "*Garamendi* to deal with a state's ability to pass a law *which specifically circumvents federal foreign policy* by creating a state cause of action which provides relief for its citizens." *Id.* at 498 (citing *Garamendi*, 396 U.S. at 408-09; emphasis added).

[3] State courts have also properly applied the *Garamendi* distinction. See, e.g., *Taiheiyo v. Sup. Ct.* 117 Cal. App. 4th 380, 394 (2d Dist. Ct. App. 2005), applying *Garamendi* to find that a statute enacting a "*special rule* authorizing WWII slave and forced labor victims to sue and recover damages in California courts" is preempted by Treaty of Peace with Japan. (Emphasis added.)

The Second Circuit's holding in *Generali* is a substantial deviation from *Garamendi* and its progeny. In applying federal preemption analysis, the Second Circuit purports to erase any distinction between state laws that are expressly directed to foreign policy matters, and state statutes or common law causes of action that are generally applicable and operate in areas of traditional state competence. This decision represents an unwarranted shift of power, suggesting that state legislation formally enacted in areas of traditional state competence may be summarily superseded by informal policy statements made by Executive Branch representatives of the federal government. In addition, as explained below, this view chills the exercise by state legislatures across the country of their longstanding prerogative to enact legislation providing for the health, safety, and welfare of their constituents. As such, the Petition for a Writ of Certiorari should be granted.

IF LEFT UNDISTURBED, THE SECOND CIRCUIT'S DECISION WILL UNDULY HAMPER THE CALIFORNIA STATE SENATE'S ABILITY TO PROVIDE FOR THE PROTECTION OF ITS CONSTITUENTS

This Court has long respected the states' ability to pass laws of general applicability to protect the health, safety, and welfare of their residents. *See, e.g.*, *Kelly v. State of Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937) (stating "[t]he principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so

'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"; citations omitted). The Second Circuit's misapplication of *Garamendi* in this case, however, dramatically impairs this ability by erasing the distinction between state statutes of general applicability and state laws that specifically target foreign policy matters within Executive prerogative. Without clarification from this Court, the California State Senate, and other legislative bodies throughout the country, will be hamstrung in their efforts to protect their constituents.

Of utmost importance in this case is the fact that the holding of *Garamendi* was limited to the HVIRA, which was specifically aimed at regulating foreign policy related matters. *Garamendi*, 539 U.S. at 408-12. The Court found, in fact, that the HVIRA intended to apply a much more aggressive approach to providing avenues of relief for those victimized by Holocaust-era practices of insurance companies than was reflected in the Executive Branch policy. *Id.* at 421-23. As stated by Justice Souter, "[t]he basic fact is that California seeks to use an iron fist [in enacting the HVIRA] where the President has consistently chosen kid gloves." *Id.* at 427. Because the *Garamendi* majority found that the express language of the HVIRA directly conflicted with the Executive Branch's expressed foreign policy, the Court invalidated the HVIRA. *Id.* at 429.

The critical distinction between the HVIRA and the statutes of general applicability and common law claims at issue in this case is that, here, the states have not used "iron fists" or even "kid gloves" with respect to foreign policy that would run afoul of the holding of

Garamendi. In stark contrast to the HVIRA, these bodies of law were not directed to claims related to Holocaust reparations or any other foreign policy matter, but were enacted as general statutes, or developed by the courts as common law, to protect the welfare of state residents for purposes well within traditional state jurisdiction. The Second Circuit failed to make this distinction, and apparently assumed that, if a state statute of general applicability or common law cause of action has any application to a matter that is also addressed by federal foreign policy, however informally that federal policy may have been established or expressed, it must be invalidated. *Generali*, 592 F.3d at 1119.

The Second Circuit's misapplication of *Garamendi* in this case is particularly troubling when its practical consequences are considered. *Garamendi* was the first case in which it was found that "'presidential foreign policy' may itself carry the same preemptive force as a federal statute or treaty." *Movsesian*, 578 F.3d at 1056 (citing *Garamendi*, 539 U.S. at 421). *Garamendi* also represented a significant expansion of the potential sources of foreign policy because, "[u]nlike in previous cases, [the *Garamendi* court found that] the presidential foreign policy was not contained in a single executive agreement... [but rather] in several executive agreements, as well as in various letters and statements from executive branch officials at congressional hearings." *Movsesian*, 578 F.3d at 1056 (citing *Garamendi*, 539 U.S. at 421-23). *Garamendi* considerably broadened the basis upon which the Executive Branch may identify a federal foreign policy that carries with it preemptive force.

As discussed above, *Garamendi* recognized, however, that generally applicable state statutes addressing matters of traditional state competence should be given weight, and represent a strong state interest in the application of foreign policy preemption analysis. Unquestionably, "the historic police powers of the States" are traditional areas of competence for state legislation. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947) and *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985)). Such state legislation has been traditionally afforded great deference. *See, e.g., Medtronic*, 518 U.S. at 503.

Even with that caveat, the dissenting discussion in *Garamendi* raised concerns about the propriety of permitting formally enacted state legislation to be preempted, not by enacted federal law or the terms of executed international agreements, but merely on the basis of statements made by "individual sub-Cabinet members of the Executive Branch." *Garamendi*, 539 U.S. at 441-442.

Given the suggestion of the Second Circuit's decision in this case that federal preemption on this basis is equally applicable to state laws of general application and common law causes of action, without clarification from this Court it will be extremely difficult for the California State Senate to undertake the passage of general legislation on behalf of California residents without the specter of invalidation, pursuant to federal preemption, simply because that issue may become the subject of policy discussions at an international level.

This is particularly a concern given the extent to which globalization encompasses an ever-increasing scope of matters that may become the subject of international policymaking, specifically with regard to economic matters. The United States is becoming part of the globalized economy. *See, e.g.*, Frederick M. Abbott, Graham Dukes, *Global Pharmaceutical Policy: Ensuring Medicines for Tomorrow's World*, 13 DEPAUL J. HEALTH CARE L. 103, 123 (2010) (describing today's economy as a "capitalist global economy, divided into nation-states competing for markets"); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 386 (2002) (stating that "[t]he emergence of the global economy has put great pressure on American business"). The influx of foreign-made goods into the United States has become a critical feature of the American marketplace. *See* Press Release, Bureau of Econ. Analysis, U.S. Dep't of Commerce, *U.S. International Trade in Goods and Services* (Apr. 9, 2009), http://www.bea.gov/newsreleases/international/trade/2009/trad0209.htm (last visited July 26, 2010) (noting that, in February 2009, the United States imported $152.7 billion in international goods and services, maintaining a $26 billion trade deficit). It follows that there will be an increasing frequency with which international policy discussions will touch upon matters within the scope of generally applicable state laws.

Moreover, the Second Circuit's decision would introduce an unnecessary element of unpredictability to the American legal system. A fundamental tenet of American jurisprudence is the assumption that

certainty, predictability, and stability in the law are among the major objectives of the legal system. *People v. Garcia*, 39 Cal.4th 1070, 1080 (Cal. 2006). In this connection, this Court has long adhered to doctrines such as *stare decisis* in order to "ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). This consistency "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in act." *Id.* "[P]arties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." *Garcia*, 39 Cal.4th at 1080.

The Second Circuit's decision would undermine this principle. Rather than upholding common law, and statutes of general applicability enacted in areas of traditional state legislative competence, the Second Circuit's holding allows sub-Cabinet level members of the Executive Branch to invalidate these laws informally and without notice, exercising "the considerable power of foreign affairs preemption" by pronouncing federal foreign policy through the stroke of a pen. *Garamendi*, 539 U.S. at 441-42 (Ginsburg. J., dissenting) (reciting that the *Garamendi* majority found statements of foreign policy in letters of Deputy Secretary of the Treasury). This result stands in stark contrast to cardinal principles of the American system of justice.

The quagmire that the Second Circuit's decision creates for the California State Senate and state

legislative bodies throughout the country is thus apparent. If this Court permits the decision to stand, it will be impossible to determine what the law is and will be with any confidence, because state statutes that have nothing to do with foreign policy on their face will be subject to preemption, irrespective of the state's interest in the matter or whether the state law in question even stands in actual conflict with foreign policy. The ability of state legislators to reach consensus and pass bills of general application will be substantially undermined, if they are left to speculate whether those laws will be invalidated at some point in the future based solely upon foreign policy statements made by individuals within the Executive Branch. This unpredictability will improperly constrain the California State Senate in the performance of its fundamental purpose—to adequately provide for the health, safety, and welfare of the residents of California. This Court, therefore, should grant the Petition for a Writ of Certiorari to correct the errors of the Second Circuit.

CONCLUSION

For the reasons set forth herein, amicus respectfully asks this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DIANE F. BOYER-VINE
Legislative Counsel of California
State Capitol, Suite 3021
Sacramento, CA 95814-3702
(916) 341-8123
diane.boyer@lc.ca.gov

Attorney for Amicus Curiae

168

No. 10-80

Supreme Court, U.S.
FILED
AUG 13 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZIONI GENERALI, S.P.A. and BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS OF CONSTITUTIONAL LAW AND FOREIGN RELATIONS LAW IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MICHAEL D. RAMSEY*
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcala Park
San Diego, CA 92110
(619) 260-4145
mramsey@sandiego.edu

MICHAEL E. ELSNER
JOHN M. EUBANKS
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000

Counsel for Amici Curiae

* *Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
LIST OF *AMICI CURIAE*	vi
INTEREST OF *AMICI CURIAE*	1
STATEMENT AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Decision Below Conflicts With Basic Principles Of Separation Of Powers And Federalism	5
A. The Constitution's Basic Principles of Separation of Powers and Federalism Require that Mere Presidential Policies Cannot Displace Otherwise-Constitutional State Law.	6
B. The Decision Below Conflicts with Basic Constitutional Principles by Giving Preemptive Effect to Mere Presidential Policy.	10
II. *Medellin v. Texas* Reaffirmed That Mere Presidential Foreign Policy Does Not Displace State Law And Rejected Broad Readings Of *Garamendi* To The Contrary	13

Contents

Page

A. In *Medellin*, this Court Refused to Find a State Law Preempted by a Mere Presidential Foreign Policy .. 13

B. This Court's Decision in *Medellin* Limits *American Insurance Association v. Garamendi*, on which the Court of Appeals Relied, to State Laws that Conflict with Executive Agreements 17

C. The Decision Below Directly Conflicts with this Court's Decision in *Medellin* 18

III. This Case Presents an Issue of Wide-Ranging Practical Importance Relating to the President's Power over State Law 19

IV. Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

American Insurance Association v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

Barclays Bank PLC v. Franchise Tax Board,
512 U.S. 298 (1994) 4, 16

Breard v. Greene,
523 U.S. 371 (1998) 4, 16

Dames & Moore v. Regan,
453 U.S. 654 (1981) 4, 9, 12, 18

In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig.,
228 F.Supp.2d 348 (S.D.N.Y.2002) 12

In re Assicurazioni Generali S.p.A.,
592 F.3d 113 (2d Cir. 2010) 2, 7, 11, 12, 13

Medellin v. Texas,
552 U.S. 491 (2008) ..... *passim*

Movsesian v. Victoria Versicherung AG,
578 F.3d 1052 (9th Cir. 2009) 5

United States v. Belmont,
301 U.S. 324 (1937) 12, 18

Cited Authorities

Page

United States v. Pink,
315 U.S. 203 (1942) 12

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 8, 9, 10, 15, 23

Zschernig v. Miller,
389 U.S. 429 (1968) 11

United States Constitution:

Article I, Sec. 1 ..... 3, 7

Article I, Sec. 7 6

Article I, Sec. 10 11

Article II 10, 11

Article II, Sec. 1 ..... 3, 7

Article VI ..... *passim*

Cited Authorities

Page

Other:

Brief of the United States Supporting Petitioner, *Medellin v. Texas*, No. 06-984, June 28, 2007, 2007 WL 19094262 ..... 3, 14

Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001) 22

Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825 (2004) 8

James Madison, Alexander Hamilton and John Jay, *The Federalist Papers, No. 47* (Isaac Kramnick, ed., 1987) 3, 7, 8, 15, 23

Michael D. Ramsey, The Constitution's Text in Foreign Affairs 91-114 (Harvard U. Press 2007) 8

Michael Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev. 309 (2006) 21

LIST OF *AMICI CURIAE*

Brannon P. Denning is Professor of Law at Samford University Cumberland School of Law.

John O. McGinnis is Stanford Clinton Sr. Professor of Law at Northwestern University Law School.

David H. Moore is Professor of Law at Brigham Young University J. Reuben Clark Law School.

Michael D. Ramsey is Professor of Law at the University of San Diego School of Law.

Michael P. Van Alstine is Professor of Law at the University of Maryland School of Law.

Stephen I. Vladeck is Professor of Law at American University Washington College of Law.

A. Mark Weisburd is Martha M. Brandis Professor of Law at the University of North Carolina School of Law.

Ingrid Brunk Wuerth is Professor of Law at Vanderbilt University Law School.

Ernest A. Young is Alston & Bird Professor of Law at Duke University Law School.

INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is respectfully submitted by law professors with expertise in constitutional law and the foreign relations law of the United States. *Amici* submit this brief because they believe that the petition in the present case raises important issues of separation of powers and federalism on which guidance from this Court is needed. In particular, *amici* believe that the decision of the Court of Appeals below unduly expands federal executive authority relative to the states and Congress, contrary to this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008), and to the fundamental allocations of power contained in the U.S. Constitution. The *Medellin* decision emphasizes the U.S. President's inability to make binding and preemptive law through mere policy announcements. However, the court below, along with at least one other major post-*Medellin* court of appeals decision, nonetheless accords preemptive effect to unilateral executive foreign policy unsupported by any statute, treaty or executive agreement. *Amici* submit this brief to highlight the importance of the petition to fundamental constitutional principles regarding the scope of federal executive power vis-à-vis the laws of the states.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party or any other person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have been given at least 10 days notice of *amici curiae*'s intention to file. Consents of the parties are on file or are being lodged herewith.

STATEMENT AND SUMMARY OF ARGUMENT

This case raises important and recurring issues of federalism and separation of powers regarding the U.S. President's unilateral authority to preempt the laws of the states. The Court of Appeals below, on the authority of this Court's decision in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), held that a mere executive branch foreign policy, not incorporated into any federal statute, treaty, or executive agreement, preempts otherwise-constitutional state laws as applied to Petitioner's claims. *In re Assicurazioni Generali S.p.A.*, 592 F.3d 113 (2d Cir. 2010). The Court of Appeals' holding conflicts directly with this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008). In *Medellin*, this Court held that the President's announced policy that the United States would comply with a decision of the International Court of Justice (ICJ) did not override a Texas state law that conflicted with the ICJ decision. *Id.* at 524-32. *Medellin* expressly rejected the President's preemption argument, to the extent it was based on the *Garamendi* decision, on the ground that *Garamendi* involved conflict between a state law and two executive agreements. Because there was no relevant executive agreement in *Medellin*, this Court held, *Garamendi* did not support preemption of Texas' law by executive policy. *Id.* at 530-32.

This Court's decision in *Medellin* reaffirms basic constitutional principles of separation of powers and federalism. First, a central principle of federalism is that state law is valid unless it is incon-

sistent with the U.S. Constitution or in conflict with an act of federal lawmaking. Article VI of the Constitution establishes the Constitution and federal laws and treaties as "supreme Law of the Land" and thus superior to state law. Mere presidential policies are not accorded such status. Second, a central principle of separation of powers is that the President is not a lawmaker. The Constitution grants the President "the executive Power," U.S. Const. Art. II, Sec. 1; in contrast, Congress holds "[a]ll legislative Powers herein granted." U.S. Const., Art. I, Sec. 1. The core meaning of "executive Power" is that the President executes law made by others. As James Madison explained in *Federalist 47*, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." James Madison, Alexander Hamilton and John Jay, *The Federalist Papers, No. 47* (Isaac Kramnick, ed., 1987), at 304, *quoted in Medellin*, 552 U.S. at 528.

The combination of these principles, this Court concluded in *Medellin*, rejects the contention, advanced by the President in that case, that the President through the articulation of foreign policy can "establish binding rules of decision that preempt contrary state law." *See* Brief of the United States Supporting Petitioner, *Medellin v. Texas*, June 28, 2007, 2007 WL 19094262 (making this argument). To accept the President's argument, this Court explained, would make the President a lawmaker, contrary to the President's constitutional status as the holder of executive power. *See Medellin*, 552 U.S. at 524-32.

Although there may be limited exceptions – specifically, certain executive agreements made

with Congress' implicit approval, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981) – *Medellin* makes clear that *Garamendi* does not broadly overturn these basic constitutional principles with respect to all executive branch foreign policy in the way imagined by the Court of Appeals. To the contrary, *Medellin* reaffirms that, despite *Garamendi*, the basic rule remains that executive policies do not preempt state law unless and until they achieve the status of supreme law in the manner specified by Article VI. *See Medellin*, 552 U.S. at 531 (describing *Garamendi* and related cases as "involv[ing] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals"); *see also Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994) (finding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned [tax laws]."); *Breard v. Greene*, 523 U.S. 371, 378 (1998) (finding that the President could only ask, but not require, Virginia to comply with a provisional order from the ICJ).

As a result, the decision below directly conflicts with *Medellin*. Like the state law in *Medellin*, the state laws under which Petitioner brought his claims are clearly constitutional, and indeed (unlike in *Garamendi*) most of them are part of the state's ordinary and generally applicable contract and insurance law (as the law in *Medellin* was part of Texas' ordinary and generally applicable criminal law). As in *Medellin*, there is no applicable federal statute, treaty or executive agreement with

which the state laws in the present case conflict. As in *Medellin*, the only conflict claimed by the court below is between the state laws and an executive branch foreign policy. Basic constitutional principles, reaffirmed in *Medellin*, make clear that such a conflict is insufficient to override rights established under state law.

This is an issue of recurring importance warranting this Court's granting of a writ of certiorari. In addition to the decision below, at least one other post-*Medellin* court of appeals decision has, despite *Medellin* and on the authority of *Garamendi*, given preemptive effect to mere presidential policy unsupported by any federal law, treaty or executive agreement. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009). On the other hand, as the petition here highlights, other courts have – like *Medellin* – read *Garamendi* to apply only to conflicts with certain executive agreements and have not recognized preemption by mere executive branch policy. *See Petition for a Writ of Certiorari, Weiss v. Assicurazioni Generali S.p.A.*, No. 10-80, at 10-11 (citing cases). Granting review would allow this Court to clarify this fundamental constitutional relationship between federal executive power, federal lawmaking power, and state law.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH BASIC PRINCIPLES OF SEPARATION OF POWERS AND FEDERALISM

A. The Constitution's Basic Principles of Separation of Powers and Federalism Require that Mere Presidential Policies Cannot Displace Otherwise-Constitutional State Law.

The U.S. Constitution sets forth two basic principles of federalism and separation of powers that govern this case. First, state law is valid unless displaced by a superior source of federal law. Second, the President is not a lawmaker.

The first principle is established by the Constitution's Article VI, which provides that the Constitution, the "Laws of the United States which shall be made in Pursuance thereof," and federal treaties make up the "supreme Law of the Land." U.S. Const., Art. VI, cl. 2. Thus under Article VI, state law can be displaced by "supreme" federal law in two (but only two) ways: if the Constitution itself prohibits the state from acting, or if an act of supreme federal lawmaking overrides the state's law. Further, in addition to the Constitution itself, supreme federal law arises from treaties and laws made "in pursuance of" the Constitution; the Constitution's Article I, Section 7 in turn specifies the procedures by which federal law is made.

Article VI and Article I, Section 7 impose substantial procedural hurdles for the creation of federal law. It must be done (a) with the approval of majorities of both of the two separately-elected houses of Congress and of the President, (b) with a supermajority of both houses, or (c) in the case of treaties, with the approval of the President plus a supermajority of the Senate. These hurdles safeguard state interests and protect the Constitution's

federal structure, assuring that state laws are not displaced unless multiple federal actors agree that they should be.[2]

Under the second principle, as a matter of separation of powers the Constitution's designation of the President as holding "the executive Power," U.S. Const., Art. II, Sec. 1, shows the President's lack of independent lawmaking power. *Compare* U.S. Const., Art. I., Sec. 1 (stating that "[a]ll legislative Powers herein granted" shall be vested in Congress). While the precise scope of the President's "executive Power" may remain unclear, a common core understanding is that the President cannot unilaterally make law (that is, change individual legal rights and duties); to the contrary, the President's core power and authority is to execute laws made by others. The Constitution's framers saw this limit as an important check on the powerful executive office they created, and they derived it from an equally central feature of English constitutional law, which held that the king could not make law without Parliament's consent. *See* 1 William Blackstone, Commentaries on the Laws of England 142-43, 261 (1765); 4 *id.* at 67. As James Madison explained in *Federalist 47*, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law." James Madison, Alexander

---

[2] As discussed below, this Court has recognized that in "a narrow set of circumstances" state law may be preempted by certain executive agreements to which Congress has implicated assented. *See Medellin*, 552 U.S. at 531. As the Court of Appeals recognized, 592 F.3d at 118-19, no executive agreement conflicts with Petitioner's claims in this case.

Hamilton and John Jay, The Federalist Papers, *No. 47* (Isaac Kramnick, ed., 1987), at 304.[3]

These basic principles came together in this Court's most celebrated case on presidential power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, President Harry Truman by executive order directed the seizure of major U.S. steel mills due to an impending strike in order to avoid an interruption of military supplies to the on-going war effort in Korea. This Court found the President's order to be an unconstitutional law-making act.

Justice Black's opinion for the Court assumed the first proposition described above: that state law governed unless displaced by federal law. The mill owners held property rights under state law. Absent a conflicting federal act, the state law was obviously constitutional and formed the baseline of the mill owners' rights. The question in the case was whether any federal act displaced the state law. Since there was no conflicting treaty or act of Congress, the question was whether the President's order had that effect.

This Court held that it did not, applying the basic proposition that the President was not a lawmaker. As Justice Black wrote for the Court:

> In the framework of our Constitution, the President's power to see that the laws are

---

[3] *See* Michael D. Ramsey, The Constitution's Text in Foreign Affairs 91-114 (Harvard U. Press 2007); Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825, 906-24 (2004).

> faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States...."

Id. at 587-88.[4]

Although Justice Black's opinion did not fully explain why the Court regarded the President's act as a lawmaking act, the answer is evident: the President's order in *Youngstown* sought to change rights under existing law. Because state law was the baseline, the mill owners had a legal right to their property which the President sought to alter. For this reason, if mere presidential policy were to be preemptive, that would grant lawmaking power to the President.

---

[4] Justices Jackson and Frankfurter (among others) concurred to suggest some flexibility in the extent of executive power, but they did not dispute Justice Black's central premise that the President is not a lawmaker. In particular, Justice Jackson's concurrence suggested that the President might have greater latitude in certain cases when Congress has approved the President's action. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981). There is no argument, however, that in the present case that the President has taken any formal action concerning claims against Italian companies such as Generali, much less that Congress has approved any such action.

In sum, the core constitutional problem in *Youngstown* was that the President tried to make executive policy superior to existing state law. Both Article II and Article VI show this to be beyond the President's power. Under Article II, the President, like the eighteenth-century English monarch, cannot use "executive" power to issue decrees with the force of law. Article VI confirms this limit by setting forth the ways the federal government can act with the force of supreme law and by confining the President's lawmaking role to action in conjunction with one or both houses of Congress.

B. The Decision Below Conflicts with Basic Constitutional Principles by Giving Preemptive Effect to Mere Presidential Policy.

In the decision below, the Court of Appeals departed from these basic constitutional principles by giving preemptive effect to mere executive branch policy. Petitioner, who is the heir of Holocaust survivors, brought suit under various provisions of state law against Respondent Assicurazioni Generali S.p.A. and related entities ("Generali") to recover on insurance policies Generali issued to his decedents before or during the Holocaust. The U.S. executive branch has been involved for many years in supporting an international non-governmental body, the International Commission on Holocaust-Era Insurance Claims ("ICHEIC"), to settle Holocaust-era insurance claims. The Court of Appeals found that an executive branch policy of resolving claims through ICHEIC preempted state law as

applied to Petitioner's case. *In re Assicurazioni Generali S.p.A*, 592 F.3d at 118-19.

As the Court of Appeals recognized, no ordinary source of preemptive federal law conflicts with the state laws in the present litigation. The Constitution itself prevents states from acting in certain foreign affairs categories, either explicitly (chiefly in Article I, Section 10)[5] or by implication. However, none of these constitutional provisions implicates the state laws at issue here.[6] In addition, Article VI establishes treaties and statutes as preemptive federal law by making them (along with the Constitution itself) part of the "supreme Law of the Land." Again, it is not argued that the state laws at issue here conflict in any way with any federal statute or treaty.

Finally, there is no conflict between Petitioner's state-law claims and any applicable executive agreement. Although executive agreements (international agreements not made through the treaty-making process of Article II) fit uncomfortably with

---

[5] Article I, Section 10 lists certain specific actions the states cannot take, or can take only with Congress' consent, such as engaging in war or making treaties and other international agreements.

[6] In *Zschernig v. Miller*, 389 U.S. 429 (1968), this Court found that the Constitution implicitly precluded some state intrusions into U.S. foreign affairs whether or not they conflicted with announced U.S. foreign policy. The Court of Appeals did not rely on *Zschernig*, which appears limited to situations in which a state law directly insults or passes judgment upon a particular foreign government. That circumstance is plainly not implicated here.

the sources of preemptive law described in Article VI, this Court's prior decisions recognize that in certain circumstances executive agreements may have a preemptive effect akin to that of treaties. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *see also Medellin*, 552 U.S. at 531-32 (noting that "in a narrow set of circumstances" executive agreements have been regarded as preempting state law). In the present case, however, there is no governing executive agreement. The U.S. President has entered into executive agreements relating to Holocaust-era insurance claims with Germany and Austria; Generali is an Italian company and the U.S. President has not entered into any executive agreement with Italy in this regard. *See In re Assicurazioni Generali*, 592 F.3d at 118-119 (expressly concluding that the absence of an executive agreement did not preclude preemption); *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litig.*, 228 F.Supp.2d 348, 358 (S.D.N.Y.2002) (finding that "no executive agreement at issue in this case could be read to preclude litigation of [Petitioner's] claims in U.S. courts").

Nonetheless, on the strength of this Court's decision in *American Insurance Association v. Garamendi*, the Court of Appeals found that an executive branch *policy* of resolving claims (including claims against Generali) through ICHEIC preempted Petitioner's state law claims. *See In re Assicurazioni Generali*, 592 F.3d at 118-119 (repeatedly describing the state law claims as conflicting with executive "policy"). As the Court of Appeals made clear, the holding below was based di-

rectly on reading *Garamendi* to allow preemption by executive policy even absent a governing executive agreement. *Id.* at 119 (asserting that this Court in *Garamendi* "did not view the existence of an executive agreement as a prerequisite" to executive branch policy preemption).

The Court of Appeals' expansive reading of *Garamendi* conflicts with the basic constitutional principles set forth above. As described in the next section, it also squarely conflicts with this Court's decision in *Medellin* (which the Court of Appeals dismissed without explanation in a one-sentence footnote, see 592 F.3d at 119 n.2).

II. *MEDELLIN V. TEXAS* REAFFIRMED THAT MERE PRESIDENTIAL FOREIGN POLICY DOES NOT DISPLACE STATE LAW AND REJECTED BROAD READINGS OF *GARAMENDI* TO THE CONTRARY

A. In *Medellin*, this Court Refused to Find a State Law Preempted by a Mere Presidential Foreign Policy

This Court recently reaffirmed the foregoing constitutional principles as applied to presidential foreign policy in *Medellin v. Texas*, 552 U.S. 491 (2008). In *Medellin*, this Court – rejecting arguments by the executive branch that closely parallel the Court of Appeals' reasoning in the present case – held that even a "plainly compelling" presidential foreign policy, *see* 552 U.S. at 524, could not displace an otherwise-valid state law. *See id.* at 524-32.

The President argued in *Medellin* that the President's policy that the United States would comply with an International Court of Justice (ICJ) judgment should displace a provision of Texas criminal procedure that conflicted with the ICJ judgment. *See id.* at 523-24. Jose Medellin, the petitioner and a Mexican national, had been convicted and sentenced to death in Texas state court. In a case brought by Mexico on his behalf, the ICJ held that he was entitled to have his sentence reconsidered because he had not been afforded his rights under an applicable treaty, the Vienna Convention on Consular Relations. The Texas courts held that Texas law did not permit such reconsideration.

This Court and the President agreed that the ICJ judgment was not self-executing and thus not directly enforceable as preemptive federal law. *See id.* at 507-23. However, as this Court recounted, "President George W. Bush determined, through a Memorandum to the Attorney General ... that the United States would 'discharge its international obligations' under [the ICJ judgment] 'by having State courts give effect to the decision.'" *Id.* at 503, *quoting* the President's memorandum of Feb. 28, 2005. According to the President, the presidential policy reflected in this memorandum displaced Texas' state law and entitled Medellin to a new hearing on his sentence. *See* Brief of the United States Supporting Petitioner, *Medellin v. Texas*, June 28, 2007, 2007 WL 19094262 (arguing that the President by announcing U.S. foreign policy has power to "establish binding rules of decision that preempt contrary state law.").

This Court flatly rejected the claim that the President had unilateral power to preempt Texas

law in order to enforce a non-self-executing treaty. In doing so, this Court tied the question directly to the question of presidential lawmaking powers:

> Once a treaty is ratified without provisions clearly according it domestic effect ... whether the treaty will ever have such effect is governed by the fundamental constitutional principle that "'[t]he power to make the necessary laws is in Congress; the power to execute in the President.'" [quoting *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), internal quotation omitted]; see U.S. Const., Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States"). As already noted, the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto. See Art. I, §7.

Medellin, 552 U.S at 526. Thus this Court's conclusion proceeded in two steps: (1) converting a non-self-executing treaty into a domestic legal obligation that preempts state law is a lawmaking act; and (2) the President is not a lawmaker. This approach follows directly from this Court's opinion in *Youngstown*, and this Court in *Medellin* quoted Justice Black's observation in *Youngstown* that "'the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.'" *Id., quoting Youngstown,* 343 U.S. at 587. *Medellin* also invoked Madison's statement in *Federalist No. 47* that "[t]he magistrate in whom the whole executive power resides cannot of himself

make a law" and pointedly observed "[t]hat would ... seem an apt description of the asserted executive authority unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty." *Medellin*, 552 U.S. at 527-28.

In reaching this conclusion, this Court rejected executive branch arguments that the President's constitutional foreign affairs powers include power to "establish binding rules of decision that preempt contrary state law." That claim, this Court held, violated the "fundamental constitutional principle that '[t]he power to make the necessary laws is in Congress; the power to execute in the President.'" *Id.* at 526. This Court reached that conclusion, moreover, even though it acknowledged the "plainly compelling" importance to U.S. foreign affairs of the decision whether or not to comply with the ICJ judgment. *Id.* at 524.

In sum, the *Medellin* decision strongly reaffirms the proposition that, even in matters potentially affecting foreign affairs, the President cannot make law and otherwise-valid state law cannot be displaced by mere presidential foreign policy.[7]

---

[7] The result in *Medellin* comports with this Court's prior decisions addressing the question. *See Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 328-29 (1994) (finding that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned [tax laws]."); *Breard v. Greene*, 523 U.S. 371, 378 (1998) (finding that the President could only ask, but not require, Virginia to comply with a provisional order from the ICJ).

B. This Court's Decision in *Medellin* Limits *American Insurance Association v. Garamendi*, on which the Court of Appeals Relied, to State Laws that Conflict with Executive Agreements

The Court of Appeals below relied heavily on *American Insurance Association v. Garamendi* to conclude that executive branch policy, even if not reflected in an executive agreement, preempts state law. *See* 592 F.3d at 118-119. As *Medellin* makes clear, however, *Garamendi* should not be read so broadly. The executive branch advanced exactly the same reasoning in *Medellin* as the Court of Appeals employed here, and this Court expressly rejected it.

In *Garamendi*, this Court held that a California law governing Holocaust-era insurance contracts was preempted by the executive policy reflected in executive agreements with Germany and Austria relating to ICHEIC and to Holocaust-era claims against German and Austrian companies. *Garamendi*, 539 U.S. at 423-28. The Court of Appeals below read *Garamendi* to endorse a broad executive foreign policy preemption not limited to the effect of particular executive agreements, and relied on this reading of *Garamendi* in holding Petitioner's state law claims to be preempted. *See* 592 F.3d at 118-119.

However, this Court' s decision in *Medellin* expressly rejected a broad reading of *Garamendi*. In *Medellin*, the executive branch relied heavily on a broad reading of *Garamendi* – akin to the reading adopted by the Court of Appeals in the present case – to support its claim of executive foreign policy

preemption. In response, this Court, in addition to rejecting the executive's position on broader constitutional principles, directly addressed *Garamendi* and described a much more limited view of *Garamendi*'s holding. *Garamendi*, this Court explained, rested centrally on the presence of the German and Austrian executive agreements, and thus followed directly from prior cases such as *Dames & Moore* establishing the preemptive effect of certain executive agreements. As this Court put it, *Garamendi* was one of "a series of cases in which this Court has upheld the authority of the President to settle foreign claims pursuant to an executive agreement." *Id.* at 530-31 (citing *Dames & Moore*, *Pink*, and *Belmont*, all of which involved preemptive executive agreements). "The claims-settlement cases," this Court continued, "involve a narrow set of circumstances: *the making of executive agreements* to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531 (emphasis added). Moreover, the *Medellin* Court added, these prior cases relied on congressional assent to the President's longstanding practice of making such executive agreements, and "the limitations on this source of executive power are clearly set forth." *Id.* Thus, this Court concluded, *Garamendi* had no force in a case such as *Medellin*, where there was no executive agreement, but only an executive branch foreign policy. *Id.*

C. The Decision Below Directly Conflicts with this Court's Decision in *Medellin*

The decision below, relying on *Garamendi* in the absence of an executive agreement and finding

that mere executive branch policy preempts state law, fundamentally conflicts with this Court's decision in *Medellin*. As discussed, *Medellin* held that the President's policy that states would comply with the ICJ's order, as reflected in a presidential memorandum but not otherwise incorporated into federal law, did not preempt a Texas law that conflicted with the ICJ's order. Further, this Court in *Medellin* noted that *Garamendi* was not to the contrary, because *Garamendi* involved the President's power to settle claims "pursuant to an executive agreement." 552 U.S. at 530-31.

The Court of Appeals below failed to address *Medellin* directly, dismissing it in a non-substantive footnote. *See* 592 F.3d at 119 n.2 (citing *Medellin* and finding, without explanation, "nothing inconsistent" with its decision). But Petitioner's rights under state law can be displaced only by holding (as the Court of Appeals did) that mere executive branch "policy," not incorporated into any executive agreement, is preemptive. *See id.* (expressly finding that an executive agreement is "not a prerequisite" to preemption by executive policy). That proposition is exactly what this Court rejected in *Medellin*. As discussed above, in *Medellin* the President announced a policy that the states would comply with the ICJ's order, but this Court found that policy not to preempt conflicting Texas state law because the policy was not supported by a federal lawmaking act.

III. This Case Presents an Issue of Wide-Ranging Practical Importance Relating to the President's Power over State Law

The decision below, which appears to set no limits on the President's ability to displace state law pursuant to unilateral executive branch policy, would fundamentally alter both the relationship between the President and the states, and the relationship between the President and Congress. Because there are few institutional checks upon the President's ability to formulate policy, the decision's practical effect would be to grant the President a general supervisory power over state laws.

This case in particular illustrates the dangers of such a result. Under the Court of Appeals' ruling, a mere indication of policy from the executive branch – even, as in the present case, an indirect or informal indication not made by the President himself – can displace state law. In contrast, if at minimum a valid, congressionally-approved executive agreement is required for preemption, institutional limits may be maintained because the President must act formally, in concert with a foreign nation, pursuant to a commitment that becomes binding on the nation under international law, and with implicit congressional authorization.[8]

Further, the Court of Appeals appeared not to impose any limits on the kind of state law sub-

---

[8] To be clear, this case does not raise, and this brief takes no position on, the question of the circumstances under which an executive agreement can be preemptive of state law. This Court in *Medellin* noted that its prior cases giving certain executive agreements preemptive effect involved a "narrow set of circumstances" as well as implicit congressional approval. *See Medellin*, 552 U.S. at 531. In the present case, as the Court of Appeals acknowledged, there is no executive agreement of any sort in conflict with the state laws under which Petitioner's claims are raised.

ject to executive preemption. Most of the state laws on which Petitioner's claims are based are laws of general application, not specifically directed toward Holocaust-era claims or indeed any foreign affairs matters. They are simply ordinary state laws of contract and insurance.[9] In today's interconnected and globalized world, the President may plausibly claim that any state law, no matter how central to the state's own internal affairs, implicates the President's foreign policy and thus may be preempted on presidential say-so.

As a result, the decision below would, across a broad range of subjects and policies, substantially shift power to the President at the expense of Congress and the states. As described, the Constitution protects states by establishing a complex federal lawmaking process which must be navigated before preemptive law is made. Indeed, a fundamental protection for federalism values is that federal law can be made only through these difficult procedures. A leading academic commentary explains:

> Although the Supremacy Clause performs the familiar function of securing the primacy of federal law over contrary state law, it also necessarily constrains the exercise of federal power by recognizing only three sources of law as "the supreme Law of the Land." ....

---

[9] *See* Michael Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. Rev. 309, 350 (2006) (noting "the important distinction ... between a prohibition on targeted state obstruction of external affairs and the power of the national government to displace neutral state laws of general application in areas of traditional state competence").

> The Founders, in turn, prescribed finely wrought and exhaustively considered procedures elsewhere in the Constitution to govern the adoption of each type of law recognized by the Supremacy Clause. ... [F]ederal lawmaking procedures ... preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism. The text, structure, and history of the Constitution, moreover, suggest that these procedures were meant to be the exclusive means of adopting "the supreme Law of the Land." Permitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority.

Bradford Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1323 (2001). Allowing mere presidential policy to preempt state law, as the President advocated unsuccessfully in *Medellin*, and as the Court of Appeals below permitted, circumvents these protections the Constitution established for the states.

The decision below also enhances presidential power at the expense of Congress. The Constitution limits the President's power relative to other branches of the federal government by assuring that if the President wants presidential policies to have legally binding effect, the President must secure the cooperation of Congress (or of two-thirds of the Senate in the case of treaties). This provides a powerful check upon unilateral presidential policy. As discussed, under eighteenth-century English

law, leading authorities such as Blackstone – who in turn heavily influenced the American framers – saw an essential guarantee of liberty in the ancient rule that the monarch could not make law by decree. Not surprisingly, in creating and explaining the office of the Presidency, the framers adopted and invoked the fundamental rule that, as in England, the holder of executive power could not "of himself make a law." Madison, *supra*, at 304. That power they instead assigned to Congress. Correspondingly, the question whether individual rights established under otherwise-constitutional state law should be displaced in the national interest is fundamentally a question for Congress. *See Youngstown,* 343 U.S. at 587-88. The decision below would, across a broad range of cases, reallocate it to the President.

As a result, the decision below has fundamental constitutional ramifications far beyond its particular facts. By reading *Garamendi* broadly, without attention to the limits this Court emphasized in *Medellin*, the decision below would allow the President alone to decide which state laws should and should not remain in effect. Certiorari is warranted to clarify the limits of the President's ability to displace state law by executive "policy," see 592 F.3d at 118-119, unsupported by any federal lawmaking act.

IV. CONCLUSION

Amici respectfully urge that this Court grant a writ of certiorari to address the important issues of separation of powers and federalism raised by the petition.

Respectfully submitted,

MICHAEL D. RAMSEY*
University of San Diego
School of Law
5998 Alcala Park
San Diego, CA 92110
(619) 260-4145
mramsey@sandiego.edu

MICHAEL E. ELSNER
JOHN M. EUBANKS
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
(843) 216-9000

* *Counsel of Record*

August 13, 2010

168

No. 10-80

Supreme Court, U.S.
FILED
AUG 13 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THOMAS WEISS,

Petitioner,

v.

ASSICURAZIONI GENERALI, S.p.A. and
BUSINESS MEN'S ASSURANCE CO.
OF AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF OF REP. ILEANA ROS-LEHTINEN AND ELEVEN ADDITIONAL MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ALAN GURA*
CANDICE HANCE
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com

* *Counsel of Record*
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE CONSTITUTION'S ALLOCATION OF LEGISLATIVE AUTHORITY TO THE CONGRESS EXTENDS TO MATTERS CONCERNING FOREIGN POLICY 6

II. THIS COURT HAS CONSISTENTLY DEMANDED CONGRESSIONAL PARTICIPATION OR ACQUIESCENCE IN LEGISLATIVE ACTIONS RELATED TO THE CONDUCT OF FOREIGN POLICY ... 8

III. THE LOWER COURT CONTRADICTED THIS COURT'S PRECEDENT, AS WELL AS THE PRESIDENT'S NEGOTIATING POSITION 12

IV. THE LOWER COURT IMPROPERLY RECOGNIZED WHOLLY ARBITRARY EXECUTIVE-MADE LAW 16

CONCLUSION 19

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Am. Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 12, 13, 14, 17

Barclay's Bank PLC v. *Franchise Tax Bd.*, 512 U.S. 298 (1994) 10

Conn. Nat. Bank v. *Germain*, 503 U.S. 249 (1992) 17

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) ... 11, 12

Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, 545 U.S. 546 (2005) 17

Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006) 8, 10

Medellin v. *Texas*, 552 U.S. 491 (2008) ..... *passim*

Myers v. *United States*, 272 U.S. 52 (1926) 16

United States v. *Belmont*, 301 U.S. 324 (1937) 11

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 7, 8, 11

United States v. *Pink*, 315 U.S. 203 (1942) 11

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 7, 8, 9, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 1 ..... 5, 6

U.S. Const. art. I, § 8, cl. 3 7

U.S. Const. art. I, § 8, cl. 11 7

U.S. Const. art. I, § 8, cl. 18 7

TABLE OF AUTHORITIES—Continued

Page

U.S. Const. art. II, § 1 5

U.S. Const. art. II, § 2 7

U.S. Const. art. VI, cl. 2 15

STATUTES AND RULES

Sup. Ct. R. 10(a) 2

Sup. Ct. R. 10(c) 2

OTHER AUTHORITIES

Ambassador J.D. Bindenagel, Special Envoy for Holocaust Issues, U.S. Dept. of State, "The Current State of Compensation and Restitution Concerning the German Foundation," March 6, 2002, *available at* http://germany.usembassy.gov/germany/img/assets/8497/bindenagel030602.pdf (last visited Aug. 6, 2010) 14

THE FEDERALIST NO. 47 (Madison) (J. Cooke, ed., 1961) 7

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are Representative Ileana Ros-Lehtinen and eleven additional Members of Congress. *Amici* propose and pass laws that govern international relations and guide the country's foreign policy. *Amici*'s participation is required for the creation of any law that, by operation of the Supremacy Clause, may override valid laws of the States.

Congress has a significant interest in insulating its legislative role against executive encroachment, not only for its own institutional sake, but also as guardian of the States and their People's interest in maintaining the federalist structure of our government.

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The decision below announces a dramatic departure from this Court's settled understanding of executive power. Without benefit of a duly-ratified treaty, an enacted law, or even an executive agreement with another sovereign nation, the lower court granted the President authority to nullify long-standing state common law doctrines wherever the President declares that doing so is, in the President's exclusive view, in America's foreign policy interest.

This new Presidential authority to override state law, without Congressional input, is as boundless as it is arbitrary. It warrants careful review by this Court, the lower court having "so far departed from the accepted and usual course of judicial proceedings," and "sanctioned such a departure by a lower court, so as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). In so doing, the lower court determined an important question of federal law contrary to this Court's precedent. Sup. Ct. R. 10(c).

* * *

Petitioner, an American citizen, sought access to the courts of his State for the presentation of standard common law contractual and tort claims against Respondent insurance company.[2] The dispute is not

---

[2] *Amici* take no position on the ultimate outcome of that litigation.

inherently unusual—the plaintiff claims the benefit of insurance policies, the insurer would respond that its liability is limited or non-existent.

Petitioner is the beneficiary of several policies issued in the 1930's to his father, Pavel Weiss, whose first wife, three young children, and siblings were murdered in the Holocaust. Petitioner's father also sustained complete property and business losses, and no small disability owing to his concentration camp experiences. Petitioner and his family subsequently emigrated to the United States. Also surviving the war was Respondent insurance company, which had marketed many life, disability, and property casualty insurance policies to Jews throughout pre-war Europe. Whether the insurance obligations also survived, written as they were to be made payable anywhere in the world, Pet. at 8 n.3, is an issue for Florida's common law courts. Those courts, or federal courts exercising diversity jurisdiction, would weigh the evidence under the law and enter judgment for either party, but for one factor: the Executive Branch has announced that subjecting the insurer to this litigation contravenes American foreign policy interests.

No treaty, federal law, or executive agreement compels this result. The lower courts conceded as much: "no executive agreement at issue in this case could be read to preclude litigation of [plaintiffs'] claims in U.S. courts." Pet. App. 38a (citation omitted); *see also* Pet. App. 10a (rejecting view that

binding foreign policy "depended on the existence of executive agreements").

Rather, the relevant foreign policy interest, asserted as sufficiently binding to nullify the States' common law, is conveyed through nothing more than statements of Executive Branch officials. The policy interest is alleged to be reflected by a series of executive agreements with Germany, Austria, and France. Under these agreements, the Executive Branch is committed to informing courts that in consideration of the Nation's foreign policy interests, certain World War II era claims against German, Austrian, and French companies ought to be resolved by an organization that no longer functions, the International Commission on Holocaust Era Insurance Claims (ICHEIC).

Of course, in negotiating these agreements, the Executive Branch specifically advised these nations, and the Congress, that the agreements did not by themselves warrant dismissal of insurance claims in U.S. courts, but only supported dismissal on grounds otherwise available under American law. And no such agreement exists with Italy, the home country of Respondent Generali. Nonetheless, the fact that the President had entered into agreements regarding cases related to other countries, coupled with the Executive's assertion that dismissal of Petitioner's contract and tort action is in the interest of American foreign policy, was held sufficient to bar Petitioner's lawsuit.

The lower court's actions in this regard trample upon the Constitution's separation of powers by imposing the Executive's legal preferences over those of the only body tasked with creating the law. The Court's intervention is required to restore the balance of power between Congress and the President.

SUMMARY OF ARGUMENT

1. The Constitution clearly defines the role each branch of government is to play in our federal system. Congress is granted the power to make laws, U.S. Const. art. I, § 1, and the President has the authority to carry out those laws, U.S. Const. art. II, § 1.

2. Accordingly, in matters relating to foreign affairs, as in all areas, this Court enforces the Constitution's separation of powers. Even when asserting the Nation's foreign policy interests, the Executive must act under a duly-recognized legal authority—a treaty, statute, executive agreement, or similar legally binding instrument.

Any unilateral action that the President might take that would alter the law, including the preemption of state law and the alteration of legal rights and responsibilities, is strictly prohibited by the Constitution as it would encroach upon Congress's power to make the supreme law of the land. This Court has never approved the mere invocation of a foreign policy interest, unmoored from binding legal enactments, to

override state law, be it a duly enacted statute or an application of the common law.

3. Nonetheless, the lower court set out searching for binding foreign policy directives not in any legislative source, but in the statements of Executive Branch officials. Utilizing concededly non-binding executive agreements as evidence of a broader foreign policy that would encompass this litigation, the lower court not only contradicted this Court's precedent—but also reached a conclusion apparently foreclosed by the very executive agreements it used as a guide.

4. Finally, *amici* stress that where foreign policy interests are claimed to override a State's traditional common law, insistence upon adherence to recognized forms of binding federal law is critical. Murky assertions of foreign policy interests, disconnected from any law-making procedure, are far too arbitrary, and, as can be seen in this case, unpredictable. The law should be more stable and transparent.

ARGUMENT

I. THE CONSTITUTION'S ALLOCATION OF LEGISLATIVE AUTHORITY TO THE CONGRESS EXTENDS TO MATTERS CONCERNING FOREIGN POLICY.

The Constitution assigns discrete, unique functions to each branch of government. Congress is granted "*[a]ll* legislative powers herein," U.S. Const. art. I, § 1 (emphasis added). "The magistrate in whom

the whole executive power resides cannot of himself make a law." *Medellin* v. *Texas*, 552 U.S. 491, 528 (2008) (quoting THE FEDERALIST NO. 47, 326 (Madison) (J. Cooke, ed., 1961)).

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 587 (1952).

Included within Congress's legislative authority is the power to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, "declare War," U.S. Const. art. I, § 8, cl. 11, and "make all Laws which shall be necessary and proper for carrying into Execution [these] Powers," as well as the powers vested in executive officers, U.S. Const. art. I, § 8, cl. 18. The Senate must ratify treaties and confirm Ambassadorial appointments. U.S. Const. art. II, § 2.

Although this Court has held that the President may serve "as the sole organ of the federal government in the field of international relations," this authority may only be exercised pursuant to constitutional principles. *United States* v. *Curtiss-Wright*

Export Corp., 299 U.S. 304, 320 (1936). "[T]he President alone has the power to speak or listen as a representative of the nation," *id.* at 319, but this power exists in tandem with the "authority vested in the President by an exertion of legislative power." *Id.* at 319-20.

Accordingly, while Presidential authority to conduct foreign affairs "does not require as a basis for its exercise an act of Congress . . . like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." *Id.* at 320. This includes respecting the delegation of *all* legislative authority to Congress. Congress should give the President substantive latitude within which to act, *id.* at 321-22, but it need not abdicate its own duties in governing foreign matters, nor is it silenced by presidential prerogatives.

II. THIS COURT HAS CONSISTENTLY DEMANDED CONGRESSIONAL PARTICIPATION OR ACQUIESCENCE IN LEGISLATIVE ACTIONS RELATED TO THE CONDUCT OF FOREIGN POLICY.

Acknowledging the balance of powers between the various branches, this Court has routinely held unconstitutional executive actions that changed the state of the law without the consent of Congress, even when undertaken in alleged furtherance of foreign policy interests. *See, e.g.*, *Youngstown*, *supra*, 343 U.S. 579; *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006); *Medellin*, *supra*, 552 U.S. 491. An actual statute,

treaty, executive agreement, or other document having the force of law, is a prerequisite for approving of executive action.

In the seminal *Youngstown* case, this Court denied President Truman the power to seize the Nation's steel mills by executive order for the purpose of preventing a wartime materials shortage. That action would have amounted to unconstitutional law-making by the Executive. *Youngstown*, 343 U.S. at 585. The President's executive order did not stem from an act of Congress or the Constitution itself, and it did not meet the requirements for seizure of the mills under applicable federal laws. *Id.* at 585-89. Thus, it could not be deemed a constitutionally valid exercise of executive foreign affairs power. *Id.*

This Court specifically refused to invoke the President's role as Commander in Chief or his aggregate executive powers to justify the seizure, noting, "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588. The President having no exclusive legislative authority, the seizure was unconstitutional.

In *Medellin*, a case raising the same issues as this one, albeit arising in the criminal law context, this Court held that President Bush could not override Texas law by invoking the Vienna Convention. *Medellin*, 552 U.S. at 525-27. A non-self-executing treaty, the Convention could only be given force

domestically were it so empowered by Congress. *Id.* This was so even though the foreign policy concerns at issue—compliance with a ruling from the International Court of Justice and support for the Vienna Convention—were "plainly compelling." *Id.* at 524. This Court rejected the notion that the President had authority under his foreign affairs powers to "establish binding rules of decision that preempt contrary state law." *Id.* at 525 (citation omitted). To do so would encroach upon Congress' role as the sole legislative branch of the federal government. *See id.* at 526-27.[3]

Similarly, this Court recently struck down the use of presidentially convened military commissions, because the President was found to have acted under neither his constitutional authority nor an act of Congress in pursuit of his foreign policy objectives. *Hamdan*, *supra*, 548 U.S. 557. Although Congress enacted the Uniform Code of Military Justice, authorizing certain military tribunals, this Court found that the commissions contemplated by the President were not specifically authorized, and in the absence of common law support for the idea, violated the separation of powers. *Id.* at 593-95.

---

[3] *See also Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994) (holding that the Executive's challenge to California's taxation of foreign corporations doing business in the state could not preempt the state's law because it was based merely on the President's policy preferences expressed in press releases, executive agency letters, and *amicus* briefs rather than upon any documents having the force of law).

Although executive agreements have been given the force of law in foreign policy preemption cases, *see, e.g.*, *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937), that has occurred only because this Court had found such agreements to reflect Congressional acquiescence. Moreover, "the limitations on this source of executive power are clearly set forth and the Court has been careful to note that 'past practice does not, by itself, create power.'" *Medellin*, 552 U.S. at 531-32 (quoting *Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981)).[4]

Only where Congressional consent was expressed or implied through a treaty, statute, executive agreement, or other properly promulgated regulation was the Executive allowed to take action on behalf of the nation in foreign policy matters. For example, President Franklin Roosevelt's decision to declare the sale of arms to Bolivia illegal was upheld by this Court, as the prohibition was buttressed by a joint resolution of Congress authorizing the President to make such a declaration if he believed doing so would end the armed conflict in Chaco. *Curtiss-Wright*, 299 U.S. at 325.

---

[4] The citation of precedent underscoring the need for Congressional authorization of actions related to foreign policy should not be considered an endorsement by *amici* of (1) any particular foreign policy at issue in those cases, or (2) the propriety of any finding of implicit Congressional authorization or acquiescence in those cases.

And in *Dames & Moore*, *supra*, the Court found implicit Congressional approval for the President's settlement of claims between Iran and the United States pursuant to the International Emergency Economic Powers Act and the Hostage Act, and in accord with claims settlement procedures that this Court believed Congress had implicitly approved. 453 U.S. at 678.

In sum, in a variety of contexts, during times of war and of peace, this Court has consistently held that the President may not execute "laws" related to the conduct of foreign policy absent some form of legislative authorization.

III. THE LOWER COURT CONTRADICTED THIS COURT'S PRECEDENT, AS WELL AS THE PRESIDENT'S NEGOTIATING POSITION.

This Court's decision in *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003), is perfectly consistent with the established understanding requiring Congressional approval for Executive actions. *Garamendi* held a California statute that required foreign insurance companies to disclose their Holocaust-era insurance policy information was preempted by executive agreements designed to "encourage European insurers . . . to develop acceptable claims procedures, including procedures governing disclosure of policy information." 539 U.S. at 421 (citations omitted).

Yet notwithstanding *Garamendi*'s reliance on the existence of an executive agreement, the District Court found *Garamendi* "strongly implies that an executive policy need not be formally embodied in an executive agreement." Pet. App. at 37a. The Second Circuit repeated the error. Pet. App. at 10a ("[t]he Court in *Garamendi*, however, did not find that the United States policy . . . depended on the existence of executive agreements . . . . The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it.").

This view of *Garamendi* had been specifically rejected in *Medellin,* where the President cited *Garamendi* and other executive agreement cases to support the claim that his vision of American foreign policy interest was binding against state law, "independent of the United States' treaty obligations." *Medellin*, 552 U.S. at 530. This Court rejected the claim, holding that "[t]he Executive's narrow and strictly limited authority to settle international claims disputes *pursuant to an executive agreement* cannot stretch so far . . ." *Medellin*, 552 U.S. at 532 (emphasis added).

Indeed, the lower court's expansive view of the policy interests allegedly lurking beneath the ICHEIC agreement is so broad, it swallows the agreement's express limitations. As the four dissenters noted in *Garamendi,* this executive agreement *specifically disclaimed* any impact on insurance litigation. The agreement

> provides that "the United States will recommend dismissal on any valid legal ground (which, under the U. S. system of jurisprudence, will be for the U. S. courts to determine)." The agreement makes clear, however, that "the United States does not suggest that its policy interests . . . in themselves provide an independent legal basis for dismissal."

Garamendi, 539 U.S. at 436 (Ginsburg, J., dissenting) (citations omitted).

The hazards inherent in having courts guess at the content of foreign policy in applying the Supremacy Clause would be on full display should the Court grant certiorari. For example:

> Key to success was the resolution of the issue of "legal peace." European companies wanted assurances that all litigation and other legal action against them would cease and that they would never be sued again. Our government could not make such absolute guarantees for two reasons. *Our legal system does not work that way. And our Government would not bar Holocaust survivors who were U.S. citizens from having their cases heard in their own courts.*

Ambassador J.D. Bindenagel, Special Envoy for Holocaust Issues, U.S. Dept. of State, "The Current State of Compensation and Restitution Concerning the German Foundation," March 6, 2002, *available at*

http://germany.usembassy.gov/germany/img/assets/8497/bindenagel030602.pdf (last visited Aug. 6, 2010) (emphasis added).

In the name of extending the alleged policy that informed the subject agreements, the lower courts extended Respondent a benefit to which it would explicitly not be entitled even were Italy a signatory to the agreement, and which no German, Austrian, or French insurer could have expected to receive following the Executive's express denial of such a benefit. Even were the agreement to cover Generali, the most to which Respondent would be entitled would be the Executive's support for any valid defense under American law.

And of course, the agreements do not actually cover Respondent Generali. Executive agreements are agreements struck with the executives of foreign sovereigns, not executives of foreign corporations. It is for the Italian government to reach agreements with our government concerning how its subjects' liability might impact relations between our two nations. In the absence of agreement with Generali's foreign sovereign, the lower court should not have accepted the notion that relieving Generali of its legal obligations in the United States was required to advance American foreign policy.

Only federal *law* may preempt state law. U.S. Const. art. VI, cl. 2. Presidential policy that seeks to preempt contrary state law constitutes executive lawmaking, which is constitutionally impermissible.

IV. THE LOWER COURT IMPROPERLY RECOGNIZED WHOLLY ARBITRARY EXECUTIVE-MADE LAW.

Invoking the Supremacy Clause to nullify state common law, based upon mere statements of Executive actors rather than upon express, enforceable legal texts, is entirely arbitrary. As Justice Brandeis advised,

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was . . . to save the people from autocracy.

Myers v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); *Youngstown*, 343 U.S. at 613-14 (Frankfurter, J., concurring). Insistence upon a legislative product to effectuate important legal outcomes guarantees a needed measure of predictability and stability in the law, in addition to fostering the inclusiveness of the democratic process.

This Court has expressed a preference for relying, wherever possible, on the actual text of a law.

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Conn. Nat. Bank v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotation marks omitted). "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

Many people, including *amici*, may reasonably disagree about the utility of resolving textual ambiguity by resort to evidence of legislative intent. But *amici* are united in one belief: that their legislative work has value—that their votes, and the language they enact into law, are consequential. While this Court has occasionally examined evidence of legislative intent to clarify the meaning of statutory text, or found Congressional silence instructive, this Court has never endorsed the positive enforcement of legislative intent in the absence of legislative enactments. This Court would not enforce, as binding law, mere statements by Members of Congress that a particular law *would* be in the public interest.

Yet this is precisely the power awarded the President by the lower court. The decision below has the effect of rendering statutes, treaties, and executive agreements—and by extension, Congressional involvement in the formulation of such laws—superfluous. The *Garamendi* agreements were understood by the lower court to not control this action, and there the matter should have ended. And yet the agreements were deemed to be essentially symptomatic of a deeper binding foreign policy interest, known only

to, and revealed only by, Executive Branch officials. When revealed in the decision below, this policy contradicted the agreement it was said to have manifested.

The arbitrary nature of the lower court's action is plain. The lower court sought out the hidden, yet binding foreign policy not by looking to the United States Code or Federal Register, but by seeking input from Secretary of State Rice. Pet. App. 7a. Without any apparent sense that there might be something wrong with applying the Supremacy Clause in this fashion, the lower court returned to the State Department for another perspective after the last Presidential election:

> Because of the possibility of change of foreign policy after the intervening change of administration in 2009, we then inquired of the new Secretary of State Hillary Rodham Clinton whether, in the new administration, the foreign policy of the United States continued unchanged.

Id. This, the lower court did in order to "erase any . . . doubt" as to the foreign policy interest. Pet. App. at 11a. Of course, a future court might obtain contrary advice from the next President, or even from the current President, should he determine that the Nation's policy interests have changed.

Lost in all of this is the fact that an American citizen wishing to access his local court for the resolution of state common law claims suddenly finds the

courthouse door closed, not because of any duly ratified treaty or enacted law, but essentially, on the order of the Secretary of State, with whom a federal court of appeals periodically inquires to determine if the lawsuit might go forward.

The Founders' reverence for the rule of law and the balance of powers among branches of the government cannot tolerate such a result.

CONCLUSION

For the foregoing reasons, *amici* Members of Congress respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

ALAN GURA*
CANDICE HANCE
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085

**Counsel of Record*
Counsel for Amici Curiae

APPENDIX

THOSE JOINING IN *AMICI CURIAE* BRIEF

The following members of the United States Congress join in this brief:

Representative Ted Deutch (FL-D)
Representative Eliot Engel (NY-D)
Representative Alcee Hastings (FL-D)
Representative John Garamendi (CA-D)
Representative Ron Klein (FL-D)
Representative Carolyn B. Maloney (NY-D)
Representative Sue Myrick (NC-R)
Representative Mike Pence (IN-R)
Representative Ileana Ros-Lehtinen (FL-R)
Representative Adam Schiff (CA-D)
Representative Brad Sherman (CA-D)
Representative Debbie Wasserman Schultz (FL-D)

174

(7)

OCT 29 2010

No. 10-80

IN THE

Supreme Court of the United States

In re ASSICURAZIONI GENERALI, S.P.A.,
DR. THOMAS WEISS,

Petitioner,

v.

ASSICURAZONI GENERALI, S.P.A. and
BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

SAMUEL J. DUBBIN
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA,
IRVINE SCHOOL OF LAW
401 E. Peltason
Irvine, CA 92697-8000
(949) 824-7722
EChemerinsky@law.uci.edu

233085

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

INTRODUCTION 1

A. Subsequent Federal Appellate Decisions Highlight the Inter-Circuit Split in Applying *Garamendi* 3

B. This Court Should At a Minimum Require the Solicitor General to Address Petitioner's Certiorari Arguments 8

TABLE OF CITED AUTHORITIES

Page

CASES

American Insurance Association v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

Dunbar v. Seger-Thomschitz,
615 F.3d 574 (5th Cir. 2010) 6, 7

Faculty Senate of Florida International University v. Winn,
616 F.3d 1206 (11th Cir. 2010) 7, 8

G.B.B. Investments, Inc. v. Hinterkopf,
343 So.2d 899 (Fla. 3d DCA 1977) 7

In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.,
592 F.3d 113 (2d Cir. 2010) ..... *passim*

Medellin v. Texas,
552 U.S. 491, 128 S.Ct. 1346,
170 L.Ed.2d 190 (2008) 2, 5, 6

Movesesian v. Victoria Verisicherung, A.G.,
578 F.3d 1052 (9th Cir. 2009) 6

Museum of Fine Arts v. Seger-Thomschitz,
2010 WL 4010121 (1st Cir. Oct. 14, 2010) 3, 6

Cited Authorities

Page

Psychiatric Assoc. v. Siegel,
610 So.2d 419 (Fla. 1992) 7

Von Saher v. Norton Simon Museum,
592 F.3d 954 (9th Cir. 2010) 2, 8, 9, 12

Von Saher v. Norton Simon Museum,
Supreme Court Case No. 09-1254 2

OTHER CITED AUTHORITIES

A. Mark Weisburd, Medellin, the President's Foreign Affairs Power and Domestic Law,
28 Penn St. Int'l L.Rev. 595 (2010) 5

Amy Biegelsen, "DOJ Releases, Then Tries to Reel In, Documents In Holocaust Case," *Center for Public Integrity*, October 13, 2010, http://www.publicintegrity.org/articles/entry/2522 11

La Civ. Code art 3544 (1870) 6

La Civ. Code art. 3506 (1870) 6

Statement of Congressman Adam Schiff, September 22, 2010, Hearing on H.R. 4596, the "Holocaust Insurance Accountability Act of 2010;"http://judiciary.house.gov/hearings/hear_100922.html 11

Supreme Court Rule 44.2 1

Petitioner, Thomas Weiss, M.D. ("Petitioner" or "Weiss"), seeks rehearing of this Court's October 4, 2010 Order Denying his Petition for a Writ of Certiorari, pursuant to Rule 44.2 of the Supreme Court Rules.[1] Rehearing and a grant of certiorari are warranted in light of intervening circumstances of a substantial and controlling effect, and other substantial grounds not previously presented. Alternatively, for the reasons explained below, at a minimum, the Court should invite the Solicitor General's Office to submit its position on the petition in this case.

INTRODUCTION

The Weiss certiorari petition argued that the decision of the Second Circuit Court of Appeals in *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, 592 F.3d 113 (2d Cir. 2010), radically expanded the scope of "federal preemption" under *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) by finding preemption (1) based solely on letters and amicus briefs from lower level executive branch officials, rather than based on an act of federal lawmaking such as a treaty, statute, or executive agreement, and (2) applying foreign policy preemption to nullify plaintiffs' claims arising under generally applicable state common law such as contract and tort law, areas of unquestioned traditional state concern which under prior precedents including *Garamendi* would not warrant preemption under the "foreign affairs doctrine."

---

1. Under Rule 44.2, this Petition for Rehearing is timely.

There are several developments which call for this Court to reconsider the denial of certiorari. First, recent decisions of three different circuit courts, including the First Circuit on October 14, directly and openly conflict with the Second Circuit's broad reading of *Garamendi*. Further, the First Circuit decision explicitly agrees with Petitioner that the view of *Garamendi* adopted by the Second Circuit was overruled by this Court's decision in *Medellin v. Texas*.

Second, this Court invited the Solicitor General to present the views of the United States in a Holocaust art case, *Von Saher v. Norton Simon Museum*, Supreme Court Case No. 09-1254, which raises one or more questions that overlap with the Weiss Petition. The issue in *Von Saher* is whether California's extended statute of limitations for Holocaust–related art claims is preempted because it focuses on restitution of property confiscated during war, which the Ninth Circuit held was a Federal government function such that "California can make 'no serious claim to be addressing a traditional state responsibility.'" *Von Saher v. Norton Simon Museum of Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010), *quoting Garamendi*, 539 U.S. at 419, n.11.

The Solicitor General's input on whether California's Holocaust art statute of limitations is a matter of traditional state competence is directly relevant to the Weiss Petition. Due to the substantial overlap in the issues presented by the two petitions, and the role the Department of Justice played in the *Generali* decision below, in the interest of fairness it would be appropriate, at a minimum, for this Court to invite the Solicitor General to provide his views on the Weiss Petition as well.

A. Subsequent Federal Appellate Decisions Highlight the Inter-Circuit Split in Applying *Garamendi*

In *Generali*, the Second Circuit rejected the admonition of *Garamendi* that generally applicable state laws addressing traditional areas of state interest are entitled to greater deference when challenged on foreign policy grounds, as compared to enactments which are meant to achieve foreign policy objectives. 539 U.S. at 420, 425-26. The Second Circuit held, contrary to *Garamendi* and contrary to three recent court of appeal decisions, that "state law must yield to the federal policy [of non-adversarial resolution of Holocaust survivors' claims], regardless of the importance of the interests behind the state law." Weiss Petition for Certiorari at 6, *quoting Generali*, 592 F.3d at 119.

Ten days after this Court denied certiorari, the First Circuit Court of Appeals reached a decision which conflicts with the Second Circuit *Generali* decision in *Museum of Fine Arts v. Seger-Thomschitz*, 2010 WL 4010121 (1st Cir. Oct. 14, 2010). In *Museum of Fine Arts*, the heir of a Jewish art collector from Austria who was persecuted by the Nazis contended that under *Garamendi*, a number of international agreements joined by the United States government supporting resolution of looted art claims based on the "facts and the merits" of the claims, rather than on legal technicalities, preempted Massachusetts' three-year statute of limitations.

The heir's claim was dismissed by the trial court because it was filed more than three years after she first

learned that a valuable painting hanging in the Boston Museum of Fine Arts was among those bequeathed to her. She relied on a "federal statute and several international declarations signed by the executive branch that touch on the subject of Nazi-looted art," and argued that under *Garamendi*, they "constitute evidence of a federal policy disfavoring the application of rigid limitations periods to claims for Nazi-looted artwork." That federal policy, she contended, was "capable of preempting the Massachusetts statute of limitations." 2010 WL 4010121, at *9.

The First Circuit rejected the plaintiff's argument because the Massachusetts law in question was a law of general applicability and represented a traditional area of state lawmaking:

> Even if there were an express federal policy disfavoring overly rigid timeliness requirements, the Massachusetts statute of limitations would not be in "clear conflict" with that policy. The Supreme Court indicated in *Garamendi* that it is appropriate to "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." 539 U.S. at 420. The enactment of generally applicable statutes of limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims. In that sense the statute in this case is unlike the law in *Garamendi*, which "effectively single[d] out

> only policies issued by European companies, in Europe, to European residents, at least 55 years ago." *Id.*, at 425-26 (distinguishing HVIRA from a "generally applicable 'blue sky' law").

2010 WL 4010121, at *11.

The First Circuit not only disagreed with the Second Circuit *Generali* decision on the ability of foreign policy to preempt generally applicable state laws, but in a footnote, explicitly agreed with Petitioner's argument that this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008) overruled *Garamendi* on the other major issue raised by the Weiss petition, i.e. the requirement of an act of federal lawmaking as an indispensable element of preemption:

> We recognize that the Supreme Court's decision in *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), may have cast doubt on the continuing vitality of *Garamendi*. *See, e.g., A. Mark Weisburd, Medellin, the President's Foreign Affairs Power and Domestic Law*, 28 Penn St. Int'l L.Rev. 595, 625 (2010)("One fairly clear consequence of *Medellin* is that the very broad language used in *American Ins. Ass'n v. Garamendi* no longer carries weight." (footnote omitted)).
>
> *But see In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113, 119 n. 2 (2d Cir. 2010)(concluding that *Medellin* is consistent with a broad

> understanding of *Garamendi*); *Movesesian v. Victoria Verisicherung, A.G.*, 578 F.3d 1052, 1059 (9th Cir. 2009)(acknowledging *Medellin* but nonetheless applying *Garamendi* broadly). We express no opinion on that issue. Even if the *Garamendi* doctrine retains its full force, it does not aid Seger-Thomschitz in this case.

2010 WL 4010121, note 12.

Similarly, on August 20, the Fifth Circuit Court of Appeals, in *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), rejected the argument that under *Garamendi*, international compacts supported and approved by the United States urging non-adversarial, merits-based resolution of looted art claims preempt Louisiana's generally applicable and long-standing prescription laws.

> There are key distinctions between this case and *Garamendi*. In *Garamendi*, California was essentially pursuing independent policy objectives in favor of Holocaust victims. . . . In this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. La Civ. Code art 3544 (1870); La Civ.Code art. 3506 (1870). Louisiana's laws are well within the realm of traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these

> prescriptive laws, Louisiana has not infringed on any exclusive federal powers. . . . The type preemption established by *Garamendi* is thus inapplicable; Louisiana's prescriptive laws are not preempted by the Terezin Declaration, U.S. foreign policy, or the President's foreign affairs powers.

Id., at 579.[2]

On August 31, 2010, the Eleventh Circuit Court of Appeals also applied *Garamendi* differently than the Second Circuit in rejecting a foreign affairs preemption challenge to a Florida law prohibiting expenditures for travel by state employees to countries the U.S. government had listed as State Sponsors of Terrorism. In *Faculty Senate of Florida International University v. Winn*, 616 F.3d 1206 (11th Cir. 2010), the court held:

> No clear conflict between federal policy and state law à la *Garamendi* is presented here. But, even if some indistinct desire on the part of the Executive Branch or Congress to encourage generally academic travel has been shown, the strength of Florida's traditional state interest in managing its own spending

---

2. The Fifth Circuit in *Dunbar* cites the Louisiana prescription statutes that date back to 1870 as examples of a law expressing traditional state interest of general applicability. Similarly, Florida's tradition of access to courts for common law claims has been enshrined in the Florida Constitution since 1833. *See, e.g. Psychiatric Assoc. v. Siegel*, 610 So.2d 419 (Fla. 1992); *G.B.B. Investments, Inc. v. Hinterkopf*, 343 So.2d 899, 902 (Fla. 3d DCA 1977).

> and the scope of its academic programs is sufficient to overcome the conflict given the lack of the conflict's clarity and severity. *See [Garamendi]* at 2389 ("[I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.").

Id., at 1211.

Consequently, Petitioner urges this Court to revisit its denial of certiorari of October 4, and grant review of the Second Circuit decision below.

B. This Court Should At a Minimum Require the Solicitor General to Address Petitioner's Certiorari Arguments.

On the same day this Court denied certiorari in *Weiss v. Generali*, it invited the Solicitor General to "file a brief in this case expressing the views of the United States" in *Marei Von Saher v. Norton Simon Museum of Pasadena*, Case No. 09-1254. The issue presented by the Petitioner in *Van Saher* revolves around one of the same questions raised by Weiss under *Garamendi*, i.e. the nature of the state law rights which are alleged to be in conflict with U.S. "foreign policy," and the relative weight to be accorded the state law in consideration of the particular U.S. foreign policy asserted.

In *Von Saher*, the Ninth Circuit held that the California statute extending the statute of limitations

for Holocaust survivors' and heirs' art claims was "not an area of 'traditional state responsibility'" and subjected the law to a field preemption analysis. *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 965 (9th Cir. 2010), citing *Garamendi*, 539 U.S. at 419 n. 11.

The Solicitor General will therefore be offering his views on the question above, an issue on which three other circuit courts of appeal have disagreed with the Second Circuit, which gave absolutely no weight to Florida's long-standing common law contract and tort remedies in the face of the United States government's assertion of a "foreign policy conflict," despite the injunction in *Garamendi* requiring the court "to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."). *See* 539 U.S. at 420; Weiss Petition, at 6, citing 539 U.S. at 425-26.

The Second Circuit's decision in *Generali* was based *entirely* on its broad reading of *Garamendi* and two letters from the Department of Justice in 2008 and 2009. The letters were written in response to the Court's questions, in the face of a record that the Clinton Administration in 2000 and 2001 rejected any foreign policy interest in Generali's favor, asking whether litigation under state law against Generali conflicted with U.S. foreign policy. The submissions of the Department of Justice *created and defined* the statements of U.S. foreign policy that formed the basis of the Court's decision.

Interestingly, the DOJ itself explicitly recognized that there was a difference for preemption purposes whether the state law involved was similar to California's HVIRA touching on foreign policy, or whether the plaintiffs were asserting common law claims. DOJ took no position "on whether plaintiffs' claims are preempted by its foreign policy in light of *American Insurance Ass'n v. Garamendi*, . . . except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), which, as the supreme Court held in *Garamendi*, impermissibly impede the conduct of foreign policy and are thus preempted." Letter Brief of United States Department of Justice, October 30, 2008, at 2, Weiss Petition App. 57a.

The Department's role in the statement of U.S. policy and its effect on preemption in the Second Circuit is important for another reason. There is now a substantial public controversy arising out of DOJ's efforts to suppress documents recently produced under the Freedom of Information Act (FOIA) and introduced in a Congressional hearing, which admit that DOJ knew it was misrepresenting U.S. policy to the Second Circuit, and also withheld its views expressing profound doubts about the soundness of Judge Mukasey's original decision dismissing plaintiffs' – the very result reached by the Second Circuit.

On September 22, 2010, in a hearing in the House of Representatives Judiciary Committee Subcommittee on Commercial and Administrative Law on legislation that would overrule *Garamendi* and the *Generali* decisions (HR 4596), Congressman Adam Schiff stated:

> Let me quote briefly from a document that was recently obtained through a Freedom of Information Act request. It was written by an attorney in the Solicitor General Office at the Department of Justice. In it, the attorney writes [regarding Judge Mukasey's original decision dismissing the plaintiffs' claims, whose affirmance is addressed in the Weiss Petition]: "On the merits, I have some reservations about the legal theory on which the district court dismissed the plaintiffs' common law claims. . . . As a general matter, 'Executive Branch Actions' that 'express federal policy but lack the force of law' do not preempt state law. While Garamendi may reflect an exception to that general rule, that principle is still subject to some doubt." I could hardly say it better myself.

Statement of Congressman Adam Schiff, September 22, 2010, Hearing on H.R. 4596, the "Holocaust Insurance Accountability Act of 2010;"http://judiciary.house.gov/hearings/hear_100922.html.

Two days after the hearing, DOJ contacted the attorney representing the survivors and heirs of survivors who requested the documents and demanded that they be "returned." *See* Amy Biegelsen, "DOJ Releases, Then Tries to Reel In, Documents In Holocaust Case," *Center for Public Integrity*, October 13, 2010, http://www.publicintegrity.org/articles/entry/2522/.

Under the circumstances, since this Court has invited the Solicitor General to present the views of the United States on the preemption issues raised in *Von Saher*, and given the clear overlap in the issues and the Department's role in the Second Circuit decision below, Petitioner requests that this Court at a minimum request an explanation from the Solicitor General about the issues raised in the Weiss Petition.

Respectfully Submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA,
IRVINE SCHOOL OF LAW
401 E. Peltason
Irvine, CA 92697-8000
(949) 824-7722
EChemerinsky@law.uci.edu

SAMUEL J. DUBBIN
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

